IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-5471

THOMAS W. WHALEN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

and

JAMES E. PYNES,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

CONSOLIDATED PETITIONS FOR WRITS OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

W. Gary Kohlman

Henry W. Asbill

Public Defender Service
for the District of Columbia
451 Indiana Avenue, N.W.
Washington, D.C. 20001
628-1200

Counsel for Petitioners

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CONSOLIDATED PETITIONS FOR WRITS OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS[1]

Thomas W. Whalen and James E. Pynes petition for writs of certiorari to review the judgments of the District of Columbia Court of Appeals in their respective cases.

1/ Both cases present the same issue and are thus consolidated pursuant to Supreme Court Rule 23(j0(5). Counsel also direct the Court's attention to their Petition For A Writ Of Certiorari in Hilton v. United States, No. 78-5350 (filed September 5, 1978), which presents a variation of the issue raised in the instant Consolidated Petition

OPINIONS BELOW

(Whalen)

The opinion of a division of the District of Columbia Court of Appeals affirming petitioner Whalen's conviction is reported at 379 A.2d 1152 (1977) and is attached hereto as Appendix A, infra, pp. 1a-15a. The separate Order of that court denying petitioner Whalen's Petition For Rehearing Or In The Alternative For Rehearing En Banc is reported at 388 A.2d 894 (1978) and is attached hereto as Appendix B, infra, pp. 16a-17a.

(Pynes)

The opinion of a division of the District of Columbia Court of Appeals affirming petitioner Pynes' conviction is reported at 385 A.2d 772 (1978) and is attached hereto as Appendix C, infra, pp. 18a-22a. The separate Order of that court denying petitioner Pynes' Petition For Rehearing Or In The Alternative For Rehearing En Banc is unreported and is attached hereto as Appendix D, infra, p. 23a.

JURISDICTION

(Whalen)

On January 8-16, 1974, petitioner Whalen was tried by a jury in the District of Columbia Superior Court on a seven count indictment for the felony-murder of one Rebecca Reiser during the course of a rape, robbery and burglary. He was convicted on five counts and was subsequently sentenced on March 4, 1974 to concurrent terms of twenty years to life imprisonment for the felony-murder (rape) and felony-murder (first degree burglary) convictions and fifteen years to life imprisonment for the second degree murder conviction. He was also sentenced to consecutive terms of fifteen years to life imprisonment for the rape conviction and ten to thirty years for the first degree burglary conviction.

On June 18, 1974, Mr. Whalen filed a timely notice of appeal in the Superior Court (copy attached as Appendix E, infra, p. 24a), and in his briefs and oral argument before the District of Columbia Court of Appeals, he challenged, inter alia, the constitutionality of the trial court's sentence. The Court of Appeals, however, affirmed his convictions for felony-murder (rape) and rape on November 10, 1977 and subsequently denied his application for rehearing and/or rehearing en banc on July 14, 1978.

(Pynes)

On November 23-29, 1978, petitioner Pynes was tried by a jury in the District of Columbia Superior Court on a three-count indictment for the felony-murder of one Overton Bonner during an armed kidnapping. He was convicted on all counts and was subsequently sentenced on January 21, 1974 to concurrent terms of twenty years to life imprisonment on each of the murder convictions and to a consecutive term of fifteen years to life imprisonment on the kidnapping conviction.

On January 23, 1974, Mr. Pynes filed a timely notice of appeal in the Superior Court (copy attached as Appendix F, infra, p. 25a), and in his briefs and oral argument before the District of Columbia Court of Appeals, he challenged, inter alia, the constitutionality of the trial court's sentence. The Court of Appeals, however, affirmed his convictions on April 26, 1978 and subsequently denied his application for rehearing and/or rehearing en banc on June 27, 1978.

The jurisdiction of this Court over both cases is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the doctrine of merger of offenses, an integral

part of the Double Jeopardy Clause of the Fifth Amendment to the Federal Constitution, precludes the respective trial courts from imposing consecutive sentences on (1) petitioner Whalen for felony-murder and the underlying offense of rape and (2) petitioner Pynes for felony-murder and the underlying offense of armed kidnapping?

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved in both cases is the Double Jeopardy Clause of the Fifth Amendment to the Federal Constitution which provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASES

(Whalen)

Petitioner Whalen was charged in a fifteen count indictment for, inter alia, the offenses of: (1) felony-murder (rape) (22 D.C. Code §§2401, 2404); (2) felony-murder (robbery) (22 D.C. Code §§2401, 2404); (3) felony-murder (first degree burglary) (22 D.C. Code §§2401, 2404); (4) second degree murder (22 D.C. Code §2403); (5) rape (22 D.C. Code §2801); (6) robbery (22 D.C. Code §2901); and (7) first degree burglary (22 D.C. Code §1801(a)).

At trial, the prosecution's theory was that Mr. Whalen, a maintenance worker at the apartment complex where the victim resided, killed her during the course of a burglary, robbery, and rape. The Government's case was based primarily on the petitioner's fingerprint and thumbprint found in the deceased's apartment and witnesses who placed him at the apartment complex on the morning of the incident.

At the conclusion of the Government's case, the court granted the petitioner's motions for judgment of acquittal as to the felony-murder (robbery) and robbery counts. The jury subsequently returned verdicts of guilty on the remaining five

counts of the indictment. The trial court eventually sentenced the petitioner to concurrent terms of twenty years to life on each of the felony-murder (rape) and felony-murder (first degree burglary) convictions and fifteen years to life on the second degree murder offense. The court also imposed sentences of fifteen years to life for rape, to run consecutively with the murder sentences, and ten to thirty years for first-degree burglary, to run consecutively with both the murder and rape sentences.

(Pynes)

Petitioner Pynes was charged by indictment with counts of: (1) first degree premeditated murder (22 D.C. Code §2401); (2) felony-murder (22 D.C. Code §§2401, 2404); (3) kidnapping while armed (22 D.C. Code §§2101, 3202); and (4) unarmed kidnapping (22 D.C. Code §2101).

At trial, the Government's theory of the case was that Mr. Pynes had killed decedent Bonner in November of 1972 because Bonner was a potential witness against him in an armed robbery that had occurred the previous July. Accordingly, the prosecution introduced evidence concerning both the robbery and the subsequent killing. But for an alleged admission by Pynes to a fellow inmate, Raymond Monroe, the evidence that Pynes killed the deceased was weak and entirely circumstantial. And, Monroe admitted that his main reason for testifying against Mr. Pynes was that the Government authorities had offered to help him with his own pending cases.

After the jury returned verdicts of guilty of all counts, the trial court then sentenced the petitioner to concurrent terms of twenty years to life on each of the murder convictions and imposed a sentence of fifteen years to life on the kidnapping count, to be served consecutively to the sentences imposed for the murder convictions.

REASONS FOR GRANTING THE WRITS

I. THE DECISIONS BELOW AFFIRMING THE TRIAL COURTS' IMPOSITION OF CONSECUTIVE SENTENCES ON PETITIONER WHALEN FOR FELONY-MURDER AND THE UNDERLYING OFFENSE OF RAPE AND ON PETITIONER PYNES FOR FELONY-MURDER AND THE UNDERLYING OFFENSE OF ARMED KIDNAPPING CONFLICT WITH THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT AS INTERPRETED IN PRIOR DECISIONS OF THIS COURT AND THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

In their briefs and oral arguments below, both petitioners contended that the Double Jeopardy Clause precluded any sentence in excess of the mandatory sentence of twenty years to life on the felony-murder charges because the underlying felonies merged into the greater charge. As will be shown below, the lower courts' analyses in rejecting that argument are in conflict with the holdings of this Court and the United States Court of Appeals for the District of Columbia Circuit.

In Whalen v. United States, D.C.App., 379 A.2d 1152 (1977), the petitioner contended that his rape conviction merged into his felony-murder conviction based on the rape charge. The District of Columbia Court of Appeals acknowledged Whalen's argument that the underlying felony (rape) was an "element" of felony-murder and thus that the two offenses would ordinarily merge under the teachings of Blockburger v. United States, 284 U.S. 299 (1932). But, the court mistakenly, however, went on to examine the societal interests protected by the two statutes involved and concluded that because different interests were protected by the rape and felony-murder statutes, no merger occurred. The court further noted that even absent a societal interest analysis, rape was not a lesser included offense of felony (rape) murder because "while the underlying felony is an element of felony-murder it serves a more important function as an intent-divining mechanism." 379 A.2d at 1160.

In Pynes v. United States, D.C.App., 385 A.2d 772 (1978), the petitioner contended that his armed kidnapping conviction merged into his felony-murder conviction based on the kidnapping charge. The Court of Appeals, however, determined that the case did "not involve a single transaction resulting in two crimes, but a series of interrelated acts resulting in two crimes which are defined by separate statutes that are not in pari materia." 385 A.2d at 773. The court further noted that even if the transaction were continuous, the doctrine of merger would be inapplicable "because the transaction offended multiple societal interests and constituted separate offenses." Id. (citations omitted).

The Whalen and Pynes courts' "societal interest analyses" were misguided and led them to incorrect conclusions.[2/] For, if one statutory violation is an "element" of another statutory violation, then for Double Jeopardy purposes, they constitute the "same offense" and thus merge. So much was made

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2/ The Whalen court's "societal interest analysis" was also unwarranted because once it had determined that the convictions merged under Blockberger, its inquiry should have ended, and the rape conviction should have been vacated. For, it is only where no merger occurs that courts examine the interests involved to determine whether consecutive sentences should nonetheless be barred. See Prince v. United States, 352 U.S. 322 (1957); Bell v. United States, 349 U.S. 81 (1955); Ingram v. United States, 122 U.S.App.D.C. 334, 353 F.2d 872 (1965).

The Pynes court's "societal interest analysis" was unnecessary to its disposition of the case because the court there found that the felony-murder and kidnapping were separate "transactions". But that distinction is without substance, for even as the panel recognized, ". . . proof of the felony substitutes for [proof of] premeditation and deliberation by legislative fiat." 385 A.2d at 773. Moreover, were the murder and the kidnapping not part and parcel of a single transaction, there could have been no conviction for felony-murder since the code requires that the killing occur "in prepetrating or attempting to perpetrate. . . the underlying felony." 22 D.C. Code §2401 (1973).

clear in Blockburger v. United States, supra. The issue there was whether the defendant could be punished twice for violations of two distinct narcotics statutes. This Court responded:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. 284 U.S. at 304.

Blockburger, in other words, permits consecutive sentences only where neither of the two statutory violations in question is a lesser included offense of the other. Blockburger makes equally clear that if the same act or transaction results in two statutory violations and one of them has all the elements of the other, then they are considered "the same offense" because one "merges" into the other.

This Court has recently applied those concepts to factual settings analytically indistinguishable from the cases at bar. In Harris v. Oklahoma, 433 U.S. 682 (1977), the defendant was convicted of felony-murder and, in a separate prosecution, was also convicted of robbery with firearms which was the same felony underlying the felony-murder conviction. This Court, in reversing the second conviction, held that:

> When, as here, conviction for a greater crime, murder, cannot be had without a conviction for the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction for the greater one. 433 U.S. at 684.

And, in Brown v. Ohio, 432 U.S. 161 (1977), the defendant was prosecuted and punished for the crime of stealing an automobile after he had already been prosecuted and punished for the lesser included offense of operating the same vehicle without the owner's consent. This Court again reversed, holding that the Double Jeopardy Clause:

> "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969). Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense. 432 U.S. at 165.

Accordingly, Harris and Brown, when read together, undeniably support the petitioners' claims that their consecutive sentences for the underlying felonies were improper. For, if two offenses are the same for purposes of barring successive prosecutions, as in Harris v. Oklahoma, supra, and if two offenses are the same for purposes of barring multiple punishments as in Brown v. Ohio, supra, the felony-murder and underlying felonies in the instant cases necessarily are the same for the purposes of barring dual convictions and consecutive sentences in a single prosecution.[3/] Brown v. Ohio, supra, in particular, would seem to control the petitioners' claims. It involves the precise issue presented here - punishment for both a greater offense and a lesser included charge. The fact that Brown v. Ohio, supra, presents the issue after two trials is beside the point. What offended the Double Jeopardy Clause in Brown was not the successive prosecutions, which in many

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3/ The petitioners direct this Court's attention to the fact that although both Harris v. Oklahoma and Brown v. Ohio were decided more than five months prior to the District of Columbia Court of Appeals' decision in Whalen, and more than ten months prior to the same court's decision in Pynes, there is no mention of those cases in either opinion below.

instances are not constitutionally prohibited, see Ashe v. Swenson, 397 U.S. 436 (1970), but rather the net result that the defendant was twice convicted of the same offense.

The courts' opinions below are also in conflict with two decisions by the United States Court of Appeals for the District of Columbia Circuit, United States v. Greene, 160 U.S. App.D.C. 21, 34, 489 F.2d 1145, 1158 (1973), cert. denied, 419 U.S. 977 (1974), and United States v. Dancy, 156 U.S.App.D.C. 399, 401, n.6 510 F.2d 779, 781 n.6. (1975). In Greene, the appellant was sentenced consecutively for the offenses of rescue of a federal prisoner and a felony-murder which occurred during that rescue. The Circuit Court, in vacating his conviction for the rescue offense, applied the Blockburger test and held that since the charge of felony-murder included every essential element of the rescue charge, there was a merger of offenses, and thus a consecutive sentence for the felony of rescue was improper. And, in Dancy, the Circuit Court relied on its previous decision in Greene and vacated the appellant's conviction for attempted robbery while armed since it was the underlying felony of his felony-murder conviction.

These cases all make it plain what the lower courts here failed to recognize: in every felony-murder prosecution, the underlying felony "merges" into the felony-murder conviction. Those two statutory violations are, for Double Jeopardy purposes, "the same offense", because one (felony-murder) has all the elements of the other (the underlying felony). By proving the underlying felony, the Government proves an element of first-degree murder (with its mandatory 20 years to life imprisonment) that obviate its necessity to establish premeditation and deliberation, the traditional elements of first-degree murder. It is precisely because proof of the felony supplies vital elements of the first degree murder charge that cumulative punishment for both felony-murder and the underlying felony

violates the Double Jeopardy Clause.

The conflicts detailed above justify the grant of certiorari to review the District of Columbia Court of Appeals' judgments in the cases at bar.

II. THE DECISIONS BELOW AFFIRMING THE TRIAL COURTS' IMPOSITION OF CONSECUTIVE SENTENCES ON PETITIONER WHALEN FOR FELONY-MURDER AND THE UNDERLYING OFFENSE OF RAPE AND ON PETITIONER PYNES FOR FELONY-MURDER AND THE UNDERLYING FELONY OF ARMED KIDNAPPING CONFLICT WITH THE DECISIONS OF THE HIGHEST COURTS OF SEVERAL STATES WHICH HAVE INTERPPETED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT IN THE FELONY-MURDER CONTEXT.

The District of Columbia Court of Appeals decisions below rejecting the merger doctrine in the felony-murder context are at odds with the decisions of the highest courts of several states. For example, in People v. Holiday, 21 Ill.App. 3d 796, 316 N.E.2d 236 (1974), a case in which the defendant was charged with three counts of murder (first degree, second degree and felony-murder), all arising out of one killing which occurred during the course of an attempted armed robbery, the court held that:

> where the defendant is charged with an attempt to rob that results in a felony murder, sentences cannot be imposed for both offenses. . . . The only permissible sentence is for the more serious offense. . . . 316 N.E.2d at 239. (footnote and citations omitted).

Other instances in which state appellate courts have applied the merger doctrine in the felony-murder context, vacating the conviction for the underlying offense on Double Jeopardy grounds, are: Newton v. State, 280 Md. 260, 373 A.2d 262 (Md. App. 1977) (conviction for attempted robbery vacated); State v. Woods, 286 N.C. 612, 218 S.E.2d 214 (1975) (convictions for kidnapping and rape vacated); State ex rel. Wikberg v. Henderson, 292 So.2d 505 (La.App. 1974) (conviction for attempted armed robbery vacated); State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972) (conviction for breaking and entering vacated); State v. Carlson, 5 Wisc.2d 595, 93 N.W.2d 354 (1958) (conviction for arson vacated). Contra, State v. Adams, 335

So.2d 801 (Fla. 1976) (robbery conviction reinstated -- no merger); State v. Chambers, 524 S.E.2d 826, 829 (Mo. 1975) (en banc) (felony murder, stealing -- no merger).

The above-cited state court cases support the petitioners' contentions below and also warrant the grant of certiorari in the instant cases.

CONCLUSION

For the foregoing reasons, writs of certiorari should issue to review the judgments and opinions of the District of Columbia Court of Appeals in both of the cases at bar.

Respectfully submitted,

W. Gary Kohlman

Henry W. Asbill

Henry W. Asbill
Public Defender Service
for the District of Columbia
451 Indiana Avenue, N.W.
Washington, D.C. 20001
628-1200

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Consolidated Petitions For Writs Of Certiorari has been served by first class mail, postage prepaid, on the Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, this 25th day of September 1978.

Henry W. Asbill
Henry W. Asbill

The opinions attached as appendices to this petition can be found at 379 A2d 1152, 388 A2d 894, 385 A2d 772, and 385 A2d 776.

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-5471

THOMAS W. WHALEN,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

PETITION FOR CERTIORARI FILED SEPTEMBER 25, 1978.
CERTIORARI GRANTED APRIL 16, 1979

INDEX TO APPENDIX

RELEVANT DOCKET ENTRIES IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA IN CASE NO. 56141-72,
UNITED STATES OF AMERICA,
v.
THOMAS W. WHALEN

DATE	ENTRIES	JUDGE
10/3/72	Indictment filed. Assigned to Judge Daly, arraignment set for 10/18/72 at 8:30 a.m.	
10/19/72	Defendant informed of Complaint(s) and right to Counsel, plea not guilty, case continued to 11/9/72 for Status Call, bond set at One Hundred Thousand ($100,000) Dollars Surety. Judge Murphy for Arraignment only, case assigned to Judge Daly.	Murphy
1/7/74	KAREN ROBERSON, OFFICIAL COURT REPORTER. Pretrial Motion began. Case continued to 1/8/74 for trial. Bond remains. Order for accused to change clothes prior to trial filed. Motion to Suppress Statements, granted. Motion to Suppress Prior Criminal Acts, granted.	
1/8/74	KAREN ROBERSON, OFFICIAL COURT REPORTER. Trial resumed at 1:30 P.M., Jury empanelled, to be sworn at 9:30 a.m., 1/9/74. Bond remains.	Stewart
1/16/74	KAREN ROBERSON, OFFICIAL COURT REPORTER. Jury returned verdict at 11:55 a.m., Jury returned to Court at 12:25 p.m. (Court contacting Attorneys) See revised Indictment filed, verdict returned 12:25 P.M.: Verdicts: "A"—Felony Murder Rape, verdict guilty, Judgment Guilty "C"—Burglary 1, verdict guilty, Judgment guilty	

	"D"—Murder 11, verdict guilty, Judgment guilty "E"—Rape, Verdict guilty, Judgment guilty "G"—Burglary 1, Verdict guilty, Judgment guilty Counts "H" thru "O" pending. Jury form sealed and filed. No bond set pending sentencing on 3/4/74	Stewart
3/4/74	ISABELLE M. CORMIER, OFFICIAL COURT REPORTER. Sentence: "A"—(20) Twenty to Life. "C"—(20) Twenty to Life, concurrent with "A" "D"—(15) Fifteen to Life, concurrent to "A" & "C" "E"—(15) Fifteen to Life, consecutive to "A", "C" & "D" "G"—(10) Ten to (30) Thirty Years consecutive to "A", "C", "D", & "E"	Stewart
6/18/74	NOTICE OF APPEAL FILED THIS DATE. eep	

RELEVANT DOCKET ENTRIES IN THE DISTRICT OF COLUMBIA COURT OF APPEALS IN CASE NO. 8583
THOMAS W. WHALEN
v.
UNITED STATES OF AMERICA

DATE	FILINGS—PROCEEDINGS
11/10/77	OPINION per Associate Judge J. Walter Yeagley Judgment reversing the judgment in part, affirming in part, and vacating in part.
7/14/78	ORDER in printed opinion form denying the petitions for rehearing and rehearing en banc are denied. (Judges Newman, Kelly, Kern, Gallagher, Nebeker, Yeagley, Harris, Mack and Ferren) Statement by Associate Judge Gallagher.
8/8/78	MANDATE ISSUED
9/25/78	Notice of filing petition for writ of certiorari in Supreme Court dated September 25, 1978. Supreme Court No. 78-5471.
4/23/79	ORDER granting petitioner's petition for writ of in Supreme Court dated April 16, 1979.
5/8/79	Certified record sent to the US Supreme Court

SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
Holding a Criminal Term
Grand Jury Sworn in on August 1, 1972

THE UNITED STATES OF AMERICA	:	Criminal No. 56151-72
v.	:	Violation: 22 D.C. Code
THOMAS W. WHALEN	:	2401, 2403, 2801, 2901, 1801(a), 3203, 502 (First Degree Murder—Killing in Perpetrating the Crime of Rape; First Degree Murder—Killing in Perpetrating the Crime of Robbery; First Degree Murder—Killing in Perpetrating the Crime of First Degree Burglary; Second Degree Murder; Rape; Robbery; First Degree Burglary; Rape While Armed; First Degree Burglary While Armed; Assault With a Dangerous Weapon)

The Grand Jury charges:

FIRST COUNT:

On or about September 10, 1972, within the District of Columbia, Thomas W. Whalen killed Rebecca A. Rieser in perpetrating and attempting to perpetrate the crime of rape, as set forth in the fifth count of this indictment.

SECOND COUNT:

On or about September 10, 1972, within the District of Columbia, Thomas W. Whalen killed Rebecca A. Rieser in perpetrating and attempting to perpetrate the crime of robbery, as set forth in the sixth count of this indictment.

THIRD COUNT:

On or about September 10, 1972, within the District of Columbia, Thomas W. Whalen purposely killed Rebecca A. Rieser in perpetrating and attempting to perpetrate the crime of first degree burglary, an offense punishable by imprisonment in the penitentiary, as set forth in the seventh count of this indictment.

FOURTH COUNT:

On or about September 10, 1972, within the District of Columbia, Thomas W. Whalen, with malice aforethought, strangled Rebecca A. Rieser with his hands, thereby causing injuries from which the said Rebecca A. Rieser died on or about September 10, 1972.

FIFTH COUNT:

On or about September 10, 1972, within the District of Columbia, Thomas W. Whalen had carnal knowledge of a female named Rebecca A. Rieser, forcibly and against her will.

SIXTH COUNT:

On or about September 10, 1972, within the District of Columbia, Thomas W. Whalen, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Rebecca A. Rieser, property of value belonging to Rebecca A. Rieser, consisting of a passport folder containing money.

SEVENTH COUNT:

On or about September 10, 1972, within the District of Columbia, Thomas W. Whalen entered the dwelling of Rebecca A. Rieser, while Rebecca A. Rieser was inside the said dwelling, with intent to steal property of another and to commit an assault.

EIGHTH COUNT:

On or about September 9, 1972, within the District of Columbia, Thomas W. Whalen, while armed with a dangerout weapon, that is, a screwdriver, entered the dwelling of

Marjorie A. Moore, while Marjorie A. Moore was inside the said dwelling, with intent to commit an assault.

NINTH COUNT:

On or about September 9, 1972, within the District of Columbia, Thomas W. Whalen entered the dwelling of Marjorie A. Moore, while Marjorie A. Moore was inside the said dwelling, with intent to commit an assault.

TENTH COUNT:

On or about September 9, 1972, within the District of Columbia, Thomas W. Whalen, while armed with a dangerous weapon, that is, a screwdriver, had carnal knowledge of a female named Marjorie A. Moore, forcibly and against her will.

ELEVENTH COUNT:

On or about September 9, 1972, within the District of Columbia, Thomas W. Whalen had carnal knowledge of a female named Marjorie A. Moore, forcibly and against her will.

TWELFTH COUNT:

On or about September 9, 1972, within the District of Columbia, Thomas W. Whalen assaulted Marjorie A. Moore with a dangerous weapon, that is, a screwdriver.

THIRTEENTH COUNT:

On or about September 10, 1972, within the District of Columbia, Thomas W. Whalen, while armed with a dangerous weapon, that is, a knife, had carnal knowledge of a female named Ann R. Wilson, forcibly and against her will.

FOURTEENTH COUNT:

On or about September 10, 1972, within the District of Columbia, Thomas W. Whalen had carnal knowledge of a female named Ann R. Wilson, forcibly and against her will.

FIFTEENTH COUNT:

On or about September 10, 1972, within the District of Columbia, Thomas W. Whalen assaulted Ann R. Wilson with a dangerous weapon, that is, a knife.

/s/ Harold H. Titus, Jr.
Attorney of the United States in and for the District of Columbia

A TRUE BILL:

/s/ Walter L. Gieheler
Foreman

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

JUDGMENT AND COMMITMENT ORDER

United States of America
VS
Thomas W. Whalen

Case Number 56141-72A,C,D,E,G
PDID Number 153-524
Replaces 51589-72C

• • • • • •

WHEREAS the above-named defendant having entered a plea of

☐ Not Guilty ☐ Guilty

to the charge(s) of [A]Felony Murd. (Rape), [C]Felony Murd. (Burg I). [D]Murd. II, [E]Rape, [G]Burg I.

and having been found guilty by

☐ Jury ☐ the Court

and a pre-sentence investigation and report having been

☐ prepared and considered ☐ not requested

IT IS HEREBY ADJUDGED that the defendant has been convicted of and is guilty of the offense(s) charged.

The defendant having been given an opportunity to make a statement in his own behalf, and the government having had the opportunity to reply thereto, it is hereby

ORDERED that the defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of "A" (20) Twenty Years to Life, "C" (20) Twenty Years to Life, Concurrent with "A"; "D" (15) Fifteen Years to Life, Concurrent with "A" & "C"; "E" (15) Fifteen Years to Life, Consecutive to "A," "C" & "D"; "G" (10) Ten to (30) Thirty Years Consecutive to "A", "C", "D" & "E".

IT IS FURTHER ORDERED that the Clerk or his Deputy deliver a true copy of this order to the United States Mar-

shal and that the copy shall serve as the commitment of the defendant.

4 Mar 74
Date

William E Stewart
Judge

A TRUE COPY OF THIS ORDER DELIVERED TO THE U.S. MARSHAL OR HIS DEPUTY:

3-4-74
Date

Wendell C. Holmes.
/s/ Wendell C. Holmes
Deputy Clerk

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

United States of America, Plaintiff
vs. No. 56141-72
Thomas W. Whalen, Defendant

NOTICE OF APPEAL—Filed June 18, 1974

Name and address of appellant:

Thomas W. Whalen
Box 25
Lorton, Virginia 22079

Name and address of appellant's attorney:

William Gray Schaffer
805-15th Street, N.W.—Suite 419
Washington, D.C. 20005

Offense: Felony Murder (2 Counts); Murder in the Second Degree; Rape; Burglary in the First Degree

Date of Judgment or Order: Judgment of Conviction, 3/4/74; Sentence, 3/4/74; Order denying Defendant's Motions for New Trial, 6/13/74.

Brief Description of Judgment or Order: Verdict of Guilty; Judgment of Conviction; Sentence Denial of Defendant's Motions for New Trial.

Where confined, if not on bail: Lorton Reformatory, Lorton, Virginia

The above-named appellant hereby appeals to the District of Columbia Court of Appeals from the judgment or order above-mentioned.

William Gray Schaffer
(Trial) Attorney for Appellant
Telephone No. 638-2525

District of Columbia Court of Appeals.

Thomas W. WHALEN, Appellant,

v.

UNITED STATES, Appellee.

No. 8583.

Argued Nov. 11, 1976.

Decided Nov. 10, 1977.

W. Gary Kohlman, Public Defender Service, Washington, D. C., for appellant.

Peter E. George, Asst. U. S. Atty., with whom Earl J. Silbert, U. S. Atty., and John A. Terry, Asst. U. S. Atty., were on the brief, for appellee.

Before KELLY FICKLING * and YEAGLEY, Associate Judges.

YEAGLEY, Associate Judge:

At 12:30 p. m. on September 10, 1972, the partially clothed body of 26-year-old Rebecca Rieser was found lying on the floor of her room at the McLean Gardens complex in northwest Washington, D. C. The medical examiner's office determined that Ms. Rieser died sometime between 10.30 a. m. and 12:30 p. m. on that day. They discovered abrasions and signs of trauma about her neck and face, and concluded that death was caused by manual strangulation. In the course of autopsy, swabs of fluid were taken from Ms. Rieser's vagina, which when examined revealed the presence of intact sperm not more than eight hours old.

Appellant was a maintenance worker at McLean Gardens. On the morning of September 10 he had been in the approximate location of the building in which Ms. Rieser lived, for the purpose of removing from a vacant dormitory some furniture which the building manager said he could have. He had admitted to co-workers that morning of having just engaged in intercourse with someone at McLean Gardens. Later his fingerprints and palm print were found in the victim's room. Because of his duties, he had keys to all apartments and rooms at McLean Gardens.

Four days later, police arrested appellant for the rape and murder of Rebecca Rieser. At that time he was in police custody on other charges.

* Associate Judge Fickling was a member of this division at the time the case was argued, but died before entry of this opinion.

On October 3, 1972, a grand jury indicted appellant and charged him with fifteen counts of felony murder, rape, robbery, burglary and related offenses involving three different victims. On July 23, 1973, the court severed counts relating to the two victims other than Ms. Rieser and ultimately dismissed them on motion of the government. Trial commenced on October 9, 1973, but ended the next day in a defense requested mistrial.

Trial recommenced in Superior Court on January 8, 1974 and culminated on January 16, 1974 in jury verdicts of guilty on two counts of felony murder (the underlying felonies being rape and first-degree burglary), second-degree murder, rape, and first-degree burglary. The court granted motions for judgment of acquittal on counts charging appellant with robbery and felony murder (robbery). On March 4, 1974, appellant received concurrent sentences of 20 years to life on each felony murder count and 15 years to life for second-degree murder. He also received a sentence of 15 years to life for rape, to run consecutively with the murder sentences, and 10 to 30 years for first-degree burglary to run consecutively with the murder and rape sentences.

For the reasons which follow, we are compelled to reverse appellant's convictions for felony murder (first-degree burglary) and first-degree burglary. We vacate appellant's sentence for second-degree murder. We affirm appellant's convictions for felony murder (rape) and rape. We note that the action we take with regard to the offenses for which appellant received concurrent sentences will not likely affect the length of his prison term. Nonetheless, if any is founded in error we are bound to reverse in light of potential collateral consequences stemming from an invalid conviction. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). We will dispose of the many issues raised by this appeal seriatim.[1]

I. AMENDMENT OF THE GRAND JURY INDICTMENT (FIRST-DEGREE BURGLARY)

The first of appellant's contentions which we address is that the trial court erred in permitting the government to

[1] For civil litigation brought by the victim's father as a result of the incident which gave rise to this case *see Rieser v. District of Columbia*, 563 F.2d 462 (D.C.Cir., 1977).

amend count seven of the indictment subsequent to its case-in-chief to conform the indictment to a ruling of the court on the absence of evidence of theft adduced at trial. Count seven charged appellant with first-degree burglary as follows:

> On or about September 10, 1972, within the District of Columbia, Thomas W. Whalen entered the dwelling of Rebecca A. Rieser, while Rebecca A. Rieser was inside the said dwelling, with intent to steal the property of another and to commit an assault. D.C.Code 1973, § 22–1801(a).

After the trial court granted appellant's motion for judgment of acquittal on count two (felony murder (robbery)) and count six (robbery), agreeing that the evidence of theft presented at trial was legally insufficient, the government announced it would amend count seven to delete the words "to steal the property of another and". Defense counsel objected and argued that because no evidence of intent to steal had been adduced, the government had failed to prove count seven and that the court should dismiss the count. Instead, the trial court authorized the government to amend the count as it had proposed.

Appellant argues that in so doing, the trial court intruded impermissibly on his Fifth Amendment right to be charged for serious crimes only by grand jury indictment. We agree and reverse.

> The first clause of the Fifth Amendment provides:
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.

This is applicable directly to the District of Columbia. *Barry v. Hall*, 68 App.D.C. 350, 98 F.2d 222 (1938).

The indictment requirement interposes ordinary citizens as a safeguard between a prospective defendant and oppressive actions of a prosecutor or a court. *Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962); *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 41 L.Ed.2d 252 (1960); *Gaither v. United States*, 134 U.S.App. D.C. 154, 413 F.2d 1061 (1969). It aims to apprise the accused of charges against him so that he may prepare his defense, and to describe the crime charged with specificity sufficient to enable the accused to protect against future

jeopardy for the same offense. *Gaither v. United States, supra.*

These purposes are violated where an indictment is amended in substance in a manner other than by resubmission to the grand jury. *Russell v. United States*, 369 U.S. 749, 770, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962). An amendment of substance occurs when the charging terms are altered by prosecutor or court after the grand jury has last passed upon them. *Gaither v. United States, supra.* We conclude that such an alteration took place in the instant case.

Indeed, the instant case is strikingly similar to *Ex Parte Bain*, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887). In *Bain*, defendant, a banking officer, was charged with making a false report "with intent to deceive *the Comptroller of the Currency and* the agent appointed to examine the affairs of said association." *Id.* at 4, 7 S.Ct. at 783. The government thereafter moved for and the trial court ordered an amendment to strike the italicized words. The Supreme Court reversed petitioner's conviction, rejecting the trial judge's assertion that the grand jury would have indicted without the omitted language:

> But it is not for the court to say whether they would or not. *The party can only be tried upon the indictment as found by such grand jury, and especially upon all its language found in the charging part of that instrument. . . . How can the court say that there may not have been more than one of the jurors who found this indictment who was satisfied that the false report was made to deceive the comptroller, but was not convinced that it was made to deceive anybody else?* And how can it be said that, with these words stricken out, it is the indictment which was found by the grand jury? If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed. [*Id.* at 9–10, 7 S.Ct. at 786 (emphasis added).]

See also Russell v. United States, supra; Stirone v. United States, supra.

In the instant case, it would at best be speculative to say that the grand jury would have returned a true bill on count seven if the indictment had been presented to it as it appeared after the amendment. Although it might be logical to assume that any grand juror who would find intent to steal *and* to commit assault would also find either element individually, we cannot say that some grand jurors may not have relied primarily on the belief that appellant entered the victim's apartment with intent to steal. They may have been ambivalent on the question whether appellant also entered with intent to commit assault, and conceivably would have voted against the issuance of a true bill containing only the latter charge.

We are not presented with a situation in which an indictment charges several offenses, or the commission of one offense in several ways. Under such circumstances, withdrawal from the jury's consideration of one offense or one alleged method of commiting it would not constitute a forbidden amendment of the indictment. *Ford v. United States,* 273 U.S. 593, 47 S.Ct. 531, 71 L.Ed. 793 (1927); *Salinger v. United States,* 272 U.S. 542, 47 S.Ct. 173, 71 L.Ed. 398 (1926). The instant case, like *Bain,* presents an unseverable, unitary charge, stated in the conjunctive. Prior to amendment, the government had failed to prove the offense charged. As amended it was not the charge on which the grand jury indicted.

We read *Bain* to be concerned not only with whether the amendment technically charges a different offense, broader or narrower, than that charged in the original indictment, but to be concerned also with the sanctity of the grand jury process, the constitutional requirement that conviction rest on the actual indictment issued by the grand jury, and the inability to be certain that the grand jury would have indicted on the amended charge. In the instant case we cannot be certain. We thus reverse.[2]

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[2] Reversal of appellant's conviction for first-degree burglary necessitates reversal of his conviction for felony murder based on that burglary (count three) and makes it unnecessary to reach his contentions with regard to the propriety of jury instructions and sentencing in connection with his burglary conviction.

II. SUFFICIENCY OF EVIDENCE—FELONY MURDER (RAPE) AND RAPE

Appellant assigns as error the trial court's denial of his motions for judgment of acquittal on charges of felony murder (rape) (count one) and rape (count five). We find no error and affirm.

In deciding to submit these issues to the jury the trial judge need only have been satisfied that the government introduced enough evidence so that a reasonable person might find guilt beyond a reasonable doubt. *Curley v. United States,* 81 U.S.App.D.C. 389, 392–93, 160 F.2d 229, 232–33, *cert. denied,* 331 U.S. 837, 67 S.Ct. 1511, 91 L.Ed. 1850 (1947). On appeal, we view the evidence in a light most favorable to the party prevailing below. *Saunders v. United States,* D.C.App., 317 A.2d 867 (1974). The evidence in this case is compatible fully with a finding that appellant raped and killed Rebecca Rieser on September 10, 1972.

There was evidence to support a conclusion that appellant was in the victim's room at the approximate time of the events which gave rise to the charges against him. Testimony established that appellant's fingerprints were found on the victim's dresser. His palm print was lifted from a Sunday newspaper which testimony established the victim had purchased at approximately10:15 a. m. on her way home from church that morning. Appellant had keys to all apartments and rooms in the complex.

There was also evidence to support a conclusion that appellant had intercourse with the victim on the morning of her death. Intact sperm was found in her vagina. Fiber samples recovered from the victim's bedsheets, body, and clothing connected appellant with the victim. Moreover, appellant had admitted to co-workers of having engaged in intercourse at McLean Gardens on that morning.

There was evidence to support a conclusion that this intercourse was not voluntary. Evidence showed that the victim was an extremely orderly person, yet her room was disheveled when she was found, and her pants were inside out on the floor, missing a button. Her broken watchband was also found on the floor. There were strangle marks on the victim's neck. Although this evidence is circumstantial, we note that rape by its very nature rarely gives rise to eyewitness testimony.

Because this court will not reverse a conviction on the facts as long as there is evidence which reasonably permits

a finding of guilt, *Manago v. United States*, D.C.App., 331 A.2d 335, 336 (1975), and because we find evidence in abundance to support the verdict, we affirm appellant's conviction on counts one and five.

Affirmance of appellant's conviction for felony murder compels us to vacate his concurrent sentence for second-degree murder. Second-degree murder is a lesser included offense of felony murder. *Fuller v. United States*, 132 U.S. App.D.C. 264, 293, 407 F.2d 1199, 1228–29 (1967) (en banc only on question whether concurrent convictions for first-degree felony murder and second-degree murder can stand), *cert. denied*, 393 U.S. 1120, 89 S.Ct. 999, 22 L.Ed.2d 125 (1968); *Jackson v. United States*, 114 U.S.App.D.C. 181, 183, 313 F.2d 572, 574 (1962). Because appellant failed to move below to have the issue of second-degree murder submitted to the jury only as a lesser included offense, and because we do not find that the trial court's failure to do so sua sponte was plain error affecting substantial rights, we will not reverse his conviction for second-degree murder. *Fuller, supra*, 132 U.S.App.D.C. at 295, 407 F.2d at 1230. *See also Watts v. United States*, D.C.App., 362 A.2d 706 (1976) (en banc); *Adams v. United States*, D.C.App., 302 A.2d 232 (1978). This does not, however, mean that his sentence on that conviction should stand. *Fuller, supra*, 132 U.S.App.D.C. at 298 n.52, 407 F.2d at 1233 n.52.

III. MERGER OF FELONY MURDER (RAPE) AND RAPE

Appellant next contends that his conviction for rape must be vacated because this offense should merge into the felony murder which was based on it and for which appellant was also convicted and sentenced. Because the purposes of the felony murder doctrine would in this way be violated, and for reasons we shall discuss, we find no justification for the application of the doctrine of merger to felony murder. We thus affirm.

Merger of two offenses is ordinarily appropriate when the lesser offense consists entirely of some but not all of the elements of the greater offense. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); *Hall v. United States*, D.C.App., 343 A.2d 35, 38–39 (1975). Thus, for example, assault merges into assault with a dangerous weapon, and assault with a dangerous weapon

merges into armed robbery. *See Bates v. United States*, D.C.App., 327 A.2d 542 (1974); *Taylor v. United States*, D.C.App., 324 A.2d 683 (1974); *Quick v. United States*, D.C.App., 316 A.2d 875 (1974).

In determining whether merger is appropriate, this court has refused to analyze solely by abstract consideration of the statutes involved or the wording of the indictment, and has looked instead to the societal interests protected by the statutes under consideration. *Hall v. United States*, D.C. App., 343 A.2d 35, 39 (1975);[3] *cf. Williams v. Oklahoma*, 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d 516 (1959).

Shortly after our decision in *Hall* we upheld separate convictions for first-degree premeditated murder and felony murder (burglary), holding that "the societal interests served by each statute are separate and distinct." *Blango v. United States*, D.C.App., 373 A.2d 885, 888 (1977). In further explaining this rationale, we later said, "the societal interest served by the burglary statute, protection of occupied dwellings, is separate and distinct from that of the murder statute, security and value of the person." *Harris v. United States*, D.C.App., 377 A.2d 34, 38 (1977).

For similar reasons we necessarily hold that the societal interests which Congress sought to protect by enactment of D.C.Code 1973, § 22–2401 (felony murder) and § 22–2801 (rape) are separate and distinct.[4] The rape statute is to protect women from sexual assault. The felony murder statute purports to protect human life—it dispenses with the need for the prosecution to establish that the accused

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[3] In *Hall*, this court held that simple assault was not a lesser included offense of obstruction of justice by assaulting a witness, and that conviction of the former did not merge into conviction of the latter. We noted that

> the interests protected by the two statutes are widely disparate. The crime of obstructing justice is societal in that it is intended to insulate the criminal justice system from corruption whereas the crime of simple assault is intended to protect the physical security of individual citizens. [*Id.* at 39.]

See United States v. Butler, 149 U.S.App.D.C. 300, 462 F.2d 1195 (1972) (consecutive sentences for murder, housebreaking, larceny upheld); and *Irby v. United States*, 129 U.S.App.D.C. 17, 390 F.2d 432 (1967) (en banc) (consecutive sentences for housebreaking and robbery upheld), in both of which the United States Court of Appeals noted the different societal interests protected by each statute.

[4] The divergent personal and societal interests offended by rape and murder were recognised recently in another context by the Supreme Court in *Coker v. Georgia*, — U.S. —, 97 S.Ct. 2861, 2865–69, 53 L.Ed.2d 982 (1977) (death sentence for rape forbidden by Eighth Amendment as cruel and unusual punishment).

killed with a particular state of mind, and instead permits the jury to infer the requisite intent from the fact that a felony was committed.[6] We find nothing in this legislation to suggest that Congress intended the underlying offense (rape) to be nonprosecutable under the merger rule when the defendant is charged with felony murder. Accordingly there can be no merger of these offenses.

Appellant directs our attention to *United States v. Greene*, 160 U.S.App.D.C. 21, 489 F.2d 1145 (1973), in which the United States Court of Appeals held, *inter alia*, that conviction for rescue of a federal prisoner, a federal felony, merged into conviction for felony murder. The court cited no precedent for its holding, and indeed as Chief Judge Bazelon observed in his statement as to why he would grant rehearing en banc, "this court has affirmed both the underlying felony and the felony murder in countless cases."[7] *Id.* at 45, 489 F.2d at 1169.

Greene is not binding on this court[8] and we decline to apply its reasoning to this case. We find highly persuasive, however, the views expressed by Chief Judge Bazelon:

> The government itself pointed out in its petition for rehearing that this merger was predicated on a wholly erroneous understanding of the felony murder doctrine. At common law, homicides were divided into two categories, murder and manslaughter, with murder requiring a showing of "malice." Any homicide committed in the course of a felony was considered murder because malice could be implied from the commission of the felony. When homicides were further subdivided by statute into first degree murder, second degree murder and manslaughter, the doctrine of felony murder was preserved, and the underlying felony was viewed as providing the "premeditation" and "deliberation" otherwise required for first degree murder, as well as malice, where necessary.

[6] *See* R. Perkins, Criminal Law 45 (2d ed. 1969). For an excellent discussion of the felony murder rule, *see State v. Chambers*, 524 S.W.2d 826, 829 (Mo.1975) (en banc).

[7] *See, e. g., Fuller v. United States*, *supra*; *Calloway v. United States*, 130 U.S.App.D.C. 273, 399 F.2d 1006, *cert. denied*, 393 U.S. 937, 89 S.Ct. 464, 21 L.Ed.2d 448 (1968); *Coleman v. United States*, 111 U.S.App.D.C. 210, 295 F.2d 555 (1962); *Carter v. United States*, 96 U.S. App.D.C. 40, 223 F.2d 332 (1955); *Wheeler v. United States*, 82 U.S.App.D.C. 363, 165 F.2d 225 (1947), *cert. denied*, 333 U.S. 829, 68 S.Ct. 448, 92 L.Ed. 1115 (1948).

[8] *M.A.P. v. Ryan*, D.C.App., 285 A.2d 310 (1971).

> Given this rationale for the felony murder doctrine, it strains credulity to hold that the underlying felony merges into the felony murder. The statute proscribing the underlying felony—robbery, for example—is designed to protect a wholly different societal interest from the felony murder statute, which is intended to protect against homicide.
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> The underlying felony is an essential element of felony murder only because without it the homicide might be second degree murder or manslaughter. Clearly, neither manslaughter nor second degree murder merges with any other felony like robbery or assisting a prisoner to escape. [*Id.* at 44–45, 489 F.2d at 1168–69 (footnotes omitted).]

We are impressed both with Chief Judge Bazelon's societal interest analysis and with his recognition that while the underlying felony is an element of felony murder it serves a more important function as an intent-divining mechanism. Consistent with this view it is clear that rape is not a lesser included offense of felony murder, and that merger is inappropriate even absent societal interest analysis.

Appellant also directs our attention to state court decisions which have applied the merger doctrine to felony murder.[9] We find more persuasive the cases which have declined to apply merger in this situation.[9]

We cannot accept a construction of law the effect of which would be to render the underlying felony a nullity any time death occurred during its perpetration. To do so would encourage rather than deter crime.[10] We find nothing to suggest that this was the congressional intent. Appellant's conviction for rape is affirmed.

[9] *See State v. Woods*, 286 N.C. 612, 213 S.E.2d 214 (1975); *Johnson v. State*, 314 So.2d 791 (Fla.App.1975); *State ex rel. Wikberg v. Henderson*, 292 So.2d 505 (La.1974); *State v. Hubbard*, 123 N.J.Super. 345, 303 A.2d 87 (1973); *State v. Carlson*, 5 Wis.2d 595, 93 N.W.2d 354 (1958).

[9] *See United States v. Bolden*, 169 U.S.App.D.C. 60, 514 F.2d 1301 (1975) (felony murder, robbery conviction vacated on other grounds); *United States v. Heinlein*, 160 U.S.App.D.C. 157, 490 F.2d 725 (1973) (felony murder, assault with intent to rape while armed); *Coleman v. United States*, *supra* note 6 (felony murder, robbery). *See also State v. Chambers*, 524 S.W.2d 826, 829 (Mo.1975) (en banc) (felony murder, stealing).

[10] *See United States v. Butler*, 149 U.S.App.D.C. 300, 304, 462 F.2d 1195, 1199 (1972).

IV. COMPETENCE TO STAND TRIAL

Appellant contends that the trial court erred in not inquiring further into the question whether appellant was competent to stand trial. We find no such error.

At a hearing on the question of appellant's competence held on August 21, 1973, the government produced two experts.

Dr. Richard Ratner, a psychiatric consultant at St. Elizabeth's Hospital, testified that he had examined appellant on December 22, 1972 and January 5, 1973, and had on both occasions found him cooperative and to exhibit no signs of behavior disorder Dr. Ratner testified that appellant was oriented as to time, place, and events, including the circumstances surrounding the charges against him. Dr. Ratner asserted his belief that appellant had a rational, factual understanding of the proceedings against him and could assist counsel in his defense.

The government next called Dr. Thomas Polley, a clinical psychologist employed at St. Elizabeth's Hospital's pretrial evaluation section. Dr. Polley testified that he had examined appellant on December 20, 1972, and December 22, 1972, and had found him well oriented and able to describe the circumstances surrounding the charges against him. It was Dr. Polley's opinion, like Dr. Ratner's, that appellant would be willing and able to cooperate with and assist counsel in his defense. Dr. Polley testified that his examination of appellant revealed no active psychosis.[11]

Dr. Alec Whyte, a psychiatrist with the Forensic Psychiatry Office of the Superior Court, had also examined appellant. In a letter to the court dated June 2, 1973, Dr. Whyte reported that he found appellant generally competent, but lacking the specific ability to assist defense counsel properly.[12] Unfortunately, Dr. Whyte's presence at the competency hearing could not be procured. The government stated its willingness that the competency determination be

[11] Appellant's mental condition was the subject of a prior case in this jurisdiction. *See Whalen v. United States*, 120 U.S.App.DC., 331, 346 F.2d 812 (en banc), *cert. denied*, 382 U.S. 862, 86 S.Ct. 124, 15 L.Ed.2d 100 (1965).

[12] Indeed, appellant's first attorneys had complained during an informal hearing on May 23, 1973, that they were experiencing difficulty representing appellant and eliciting his cooperation. They asserted that on this basis, they had reason to question appellant's competence to stand trial. On July 2, 1973, the court permitted them to withdraw and, with appellant's approval appointed new counsel, Mr. Shaffer.

delayed pending Dr. Whyte's testimony. At this point, the following discussion took place between Judge Stewart and defense counsel:

> THE COURT: Mr. Shaffer, since commencement of your representation of Mr. Whalen, have you had or do you presently have, as his lawyer, not as a psychiatrist, but as his lawyer, any basis to assert or any basis to believe that he is unable to properly assist you, to respond to your inquiries?
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> MR. SHAFFER: No, I do not.
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> THE COURT: All right. I feel in view of the testimony which I have heard, the lack of any assertion of the defense of insanity, that the defendant is competent. Even Dr. Whyte agrees, as I best read his report.. It seems to me that with all due respect, it's more legal than medical, and in the face of the testimony which I have heard, I will sign the appropriate order indicating the finding of competency.

Appellant argues that the trial court erred in making a competency determination without hearing testimony from Dr. Whyte. We cannot say as a matter of law that the trial judge should have inquired further, and consequently we affirm his finding that appellant was competent to stand trial. Key to this determination is our refusal to substitute our judgment for that of the trial court in a situation in which reasonable persons could rightfully differ, and in which the trial court's finding had evidentiary support. *Freas v. Gitomer*, D.C.App., 256 A.2d 573, 574 (1969); *Johnson v. Lloyd*, D.C.App., 211 A.2d 764, 765 (1965). Although the testimony of Dr. Whyte might have shed additional light on the question of appellant's competence, he was unavailable. The testimony of Drs. Ratner and Polley, the letter from Dr. Whyte, the statement of appellant's attorney, Mr. Shaffer, and the trial court's familiarity with the circumstances and its opportunity to observe appellant's demeanor provided ample ground on which to make a reasoned decision.

Appellant's reliance on *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.E.2d 103 (1974) and *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966) is misplaced. In *Drope*, the trial judge concluded that the psychiatric evaluation attached to petitioner's pretrial motion

for continuance did not contain sufficient indicia of incompetence to warrant further inquiry. The judge thus directed that the case proceed to trial without a competency hearing. After trial had commenced, the judge was informed first that petitioner had attempted to choke his wife to death and subsequently that petitioner had shot himself. The trial judge nevertheless denied a mistrial. In reversing, the Supreme Court concluded that the trial judge had failed "to give proper weight to the information suggesting incompetence which came to light during trial." *Drope v. Missouri, supra,* 420 U.S. at 179, 95 S.Ct. at 907. In the instant case a hearing was held, and the record reveals that the trial judge, unlike his counterpart in *Drope,* was concerned with and sensitive to the question of appellant's competence to stand trial. Moreover, our disinclination to second-guess the trial judge finds support in *Drope:*

> There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiries to determine fitness to proceed. The question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts. [*Id.* at 180, 95 S.Ct. at 908.]

In *Pate, supra,* the Court held that petitioner was constitutionally entitled to a hearing on the issue of his competence to stand trial, notwithstanding his failure to demand one as required by Illinois statutes, and that the trial court erred in failing to invoke, sua sponte, the statutory proceedings.

Pate is similar to *Drope* and distinguishable from the instant case on two grounds. First, there was no competency hearing in *Pate.* Second, there were manifestations of incompetence during trial, specifically the repeated insistence of defense counsel that his client's present sanity was very much in issue, which there should have alerted the court to address the issue. In the instant case, defense counsel informed the court that he had no basis to believe or assert his client's lack of competence.

In sum, we find no basis to hold that the trial court erred in not inquiring further.[18]

V. SEARCH AND SEIZURE OF HAIR SAMPLES

Appellant contends that the trial court erred in admitting into evidence head and pubic hair samples seized from him without a search warrant subsequent to his arrest. He asserts that there was no probable cause to search, and that in any event, no exigent circumstances existed to justify dispensing with the search warrant requirement.

Appellant was arersted for the rape and murder of Rebecca Rieser on September 14, 1972, at 8:45 a. m. by homicide Officer Thomas J. Kilcullen of the Metropolitan Police. At that time, he was already in police custody on another charge. Almost immediately, prior to appellant's presentment at 9:30 a. m., Officer Colin Alford, a police technician with the mobile crime office, took hair samples from appellant's head and pubic area. The trial court denied appellant's motion to suppress these samples at a hearing on October 3, 1973, and held that the challenged search was valid as incident to a lawful arrest.

There is some authority to support the trial court's holding. A search incident to a lawful arrest is a well recognized exception to the warrant requirement which has been justified by the reasonableness of searching for weapons, instruments of escape, and evidence of crime when a person is taken into official custody and detained lawfully. *United States v. Edwards,* 415 U.S. 801, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1975); *Cupp v. Murphy,* 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973); *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); *Weeks v. United States,* 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914).

We hesitate to extend this rationale to the instant case, however, because it is not entirely clear whether the right to search an arrestee for evidence of crime without a warrant applies to a situation such as this, in which the evidence sought lacked for the most part an evanescent quality, *i. e.,* the possibility that it might dissipate or be lost or destroyed by the defendant, an accomplice, or the simple

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[18] We reject for the same reasons appellant's contention that the trial court erred in not appointing *amicus* counsel to represent appellant at the competency hearing after it became clear to the court that defense counsel would not contest his client's competence.

passage of time, which could justify an exception to the warrant requirement. *See Schmerber v. California,* 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

It can be argued that the Supreme Court has resolved this question in the affirmative. In *United States v. Edwards,* 415 U.S. 801, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1975), the Court upheld the warrantless seizure of petitioner's clothing, which police removed from him after he had been incarcerated for ten hours and which contained inculpatory paint chips. The Court deemed this a search incident to a lawful custodial arrest, subject to and satisfying the test of reasonableness. The Court neither relied on nor referred to the evanescent quality of the paint chips. When this is considered in light of the fact that the search took place ten hours after petitioner was arrested, a period during which a warrant could have been obtained, *Edwards* appears to carve out a broad exception to the warrant requirement for incidental searches. The *Edwards* exception does not seem to have been conditioned on the evanescent quality of the evidence seized.

We note, however, that the evanescence of fingernail scrapings was the basis for upholding their warrantless seizure in *Cupp v. Murphy, supra,* 412 U.S. at 295, 93 S.Ct. 2000, and that the paint chips in *Edwards* were similarly evanescent, even though the Court did not expressly rely on this factor.

More recently in *United States v. Chadwick,* — U.S. —, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), the Court affirmed the suppression of marijuana seized from a footlocker without a warrant after petitioners were arrested. The Court rejected the government's contention that a warrantless search of property in possession of an arrestee was always constitutionally permissible if supported by probable cause. The Court noted that once government agents gained control of the footlocker there was "no longer any danger that the arrestee might gain access to the property to seize a weapon or *destroy evidence.*" *Id.* at 2485 (emphasis added). To this apparent departure from *Edwards,* the Court added the observation that police had had one hour of exclusive control of the footlocker before they searched it, during which they could have obtained a warrant. *Id.* at 2485–86.

In the instant case police could not base a warrantless

search and seizure of hair samples on any realistic fear that appellant would destroy his own hair. Moreover, appellant was in custody at a police station and a warrant could easily have been obtained.[14] Although *Edwards* may be broad enough to support the admissibility of this evidence. *Cupp* and *Chadwick* engender doubts. We are not prepared at this time to hold that the warrantless search and seizure of hair samples from an arrestee is proper absent some additional exigent circumstance.[15] We need not, however, decide that question here because the other evidence of appellant's guilt in this case was so overwhelming as to render any possible error committed by admission of these hair samples harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

VI. VAGINAL SWABS

Appellant contends that the government mishandled vaginal swabs taken from the victim, thus depriving appellant of critical exculpatory evidence and his due process right to a fair trial, and violating his right to discovery under Super.Ct.Cr.R. 16. We disagree.

In the course of performing an autopsy on the victim, Dr. James Luke, the Chief Medical Examiner for the District of Columbia, prepared vaginal swabs which were tested in September 1972 by a government expert, Agent Cronin, for the presence of semen. Agent Cronin did not test the swabs for blood group substances, later testifying that he believed such an attempt would have produced inaccurate results in light of the likelihood of contamination from bacteria naturally present in the vagina.

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[14] *See Bouse v. Bussey,* 21 Cr.L. 2453 (7/21/77). In that case, appellant contended that his Fourth Amendment rights had been violated by defendant, a police officer who, acting without a warrant, had forcibly removed strands of appellant's pubic hair. The United States Court of Appeals for the Ninth Circuit noted that such a "warrantless search cannot be justified by exigent circumstances. Appellant was being held in custody pending trial, and there was no danger that the evidence sought might be destroyed before a warrant could be obtained." *Id.* The court accordingly held that appellant had a cause of action under 42 U.S.C. § 1983.

[15] We are not unmindful that some courts have approved the warrantless taking of hair samples by finding the attendant intrusion sufficiently minor and reasonable to justify dispensing with the search warrant requirement. *See United States v. D'Amico,* 408 F.2d 331 (2d Cir. 1969); *People v. Cutler,* 73 Mich.App. 313, 251 N.W.2d 303 (1977); *Commonwealth v. Tarver,* 345 N.E.2d 671 (Mass.1975). We decline at this time to adopt this reasoning.

The defense expert, Dr. Ruth Guy, examined the swabs in the summer of 1973. She testified that she was able to find both type A and type B blood group substances on the swabs, and that notwithstanding the possibility of bacterial contamination she had no doubt of the accuracy of her results, which showed that appellant could not have been the person who raped Rebecca Rieser.

The government called in rebuttal another expert, Dr. Alexander Weiner. Dr. Weiner testified against the efficacy of blood group analysis of the swabs, agreeing with Agent Cronin that the natural presence of vaginal bacteria precluded accurate results, and noting that, in any event, saline tests conducted by Agent Cronin to determine the presence of semen stripped the swabs of material necessary for blood group analysis.

Appellant asserts that this saline test amounted to mishandling of the swabs. He asserts further that the government packaged and stored the swabs in a manner which resulted in increasing the likelihood of bacterial contamination, and that the government was negligent in failing to test the swabs for blood type before subjecting them to procedures which created a risk of bacterial contamination.

Appellant's contention that the government mishandled the swabs and thus deprived him of important exculpatory evidence is undermined fatally by the testimony of defense expert Dr. Guy in unequivocal support of the accuracy of her findings. What this argument really comes down to is that the jury did not accept Dr. Guy's testimony and believed instead the contrary testimony of government experts, who asserted that the swabs were of no scientific value for blood grouping *ab initio*. Where there is conflicting testimony the acceptance by the jury of testimony presented by either side is binding on us. If Dr. Guy was correct, she was able to arrive at a highly accurate, untainted result. If government experts were correct, no such result could ever have been reached, no matter how the evidence was handled. The jury believed the latter. We have no basis to upset the jury's finding, and we hold that it was arrived at fairly.[16] Moreover, even if we agreed with appellant that this evidence was mishandled, the other evidence against him—tests

[16] Dr. Guy also testified that she found evidence of exculpatory AB blood grouping substances on the victim's panties and on a towel found at the scene of the crime. This the jury also apparently chose not to accept. Appellant does not contend that this evidence was mishandled.

from other stained items, fingerprints, palm print, fiber samples, statement to co-workers, presence and opportunity —renders any error committed harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).[17] Finally, rejection of appellant's contentions with respect to this issue is, of course, fatal to his assertion that the government violated his rights to discovery under Super.Ct.Cr.R. 16.

VII. PROSECUTORIAL COMMENT

Appellant contends that government counsel's closing argument included comments on appellant's failure to testify in his own behalf and that the trial court erred in not applying remedial sanctions after defense counsel objected. Government counsel's statement was as follows:

> What do you have in this case? You have a defendant who can't explain the time period or where he goes. *He*

[17] Cases on which appellant relies principally do not support his argument. In *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the prosecution withheld from petitioner a copy of an extrajudicial admission by his codefendant that the latter, and not petitioner, had committed the actual homicide. The Court held this violative of due process. In the instant case, appellant was given complete access to the vaginal swabs, and, indeed, appellant's expert conducted tests the results of which, if believed by the jury, would have exculpated appellant.

United States v. Bryant, 142 U.S.App.D.C. 132, 439 F.2d 642, *aff'd on remand*, 145 U.S.App.D.C. 259, 448 F.2d 1182 (1971), like *Brady* and unlike the instant case presented a situation in which appellant was denied access to potentially exculpatory evidence. There government agents tape-recorded conversations between appellant and an undercover agent concerning an alleged sale of narcotics. The government subsequently destroyed the tape, which it asserted was unintelligible, before appellant was given an opportunity to hear it. Appellant contended that his narcotics conviction should be overturned on *Brady* grounds. Following remand, his conviction was affirmed, because, in the court's view, the negligence involved in the loss of the evidence while in the government's possession was outweighed by a totality of very strong evidence against appellant.

Finally, in *Marshall v. United States*, D.C.App., 340 A.2d 805 (1975), appellant was convicted of robbery (purse snatching). There this court held, *inter alia*, that it was not error for the trial court to refuse to strike the complaining witness' testimony where the police had returned her purse to her and she had discarded it, making it impossible for appellant to subject it to fingerprint analysis. This court noted that the police had acted wrongfully in returning the purse before the defense was given an opportunity to examine it, but deemed highly speculative the exculpatory potential of the evidence of which appellant had been deprived. In the instant case, appellant experienced no such deprivation, and indeed the jury rejected appellant's exculpatory evidence.

has no explanation as to where he was during that time. When he was asked where he was, he admitted, when he spoke to Spencer Jenkins, he said, "I been sleeping." He knows there's a time gap in there, and at that time he—a coincidence or proof of guilt?

The particular phrase to which appellant objects is "he has no explanation as to where he was during that time." This statement, appellant asserts, violates *Griffin v. California*, 380 U.S. 609, 613–15, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), in which the Supreme Court held that the Fifth and Fourteenth Amendments forbid prosecutorial comment on an accused's failure to testify. *See also Manago v. United States, supra.*

We hold that government counsel's statement was not improper. Taken in context, the statement was clearly not a reference to appellant's failure to take the witness stand but referred instead to appellant's inability, on the morning of the rape and murder, to reply satisfactorily to a coworker who had asked him where he had been.

This court has held that the standard for resolving such cases is "whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure to testify." *Blango v. United States*, D.C.App., 335 A.2d 230, 232 (1975). In *Byrd v. United States*, D.C.App., 364 A.2d 1215 (1976), this court rejected a contention similar to the instant one, noting that "the statement by its terms did not refer specifically to the [appellant's] failure to testify or invite the jury to consider such a failure in weighing the evidence." *Id.* at 1218. *See also Tuckson v. United States*, D.C.App., 364 A.2d 138 (1976), which recognizes the right of the prosecutor to make "reasonable comments on the evidence and to draw such inferences from the testimony as will support his theory of the case." *Id* at 142.

In the instant case we believe that government counsel's statement made no suggestion, substantial or otherwise, of appellant's failure to testify, that no reasonable jury would so construe it, and that the statement was no more than a reasonable comment on the evidence. We thus find no merit to appellant's contention.

In summary, appellant's convictions for felony murder (first-degree burglary), and first-degree burglary are *reversed*. His sentence for second-degree murder is *vacated*.

Appellant's convictions for felony murder (rape) and rape are *affirmed*.

So ordered.

District of Columbia Court of Appeals.

Thomas W. WHALEN, Appellant,

v.

UNITED STATES, Appellee.

No. 8583.

July 14, 1978.

On Petitions for Rehearing or Rehearing En Banc.

W. Gary Kohlman, Public Defender Service, Washington, D.C., was on the petition for appellant.

Earl J. Silbert, U. S. Atty., Washington, D.C., with whom John A. Terry and Peter E. George, Asst. U. S. Attys., Washington, D.C., were on the petition for appellee.

Before NEWMAN, Chief Judge, and KELLY,* KERN, GALLAGHER, NEBEKER, YEAGLEY,* HARRIS, MACK and FERREN, Associate Judges.

ORDER

PER CURIAM.

On consideration of the petitions filed herein by counsel for appellant and by counsel for appellee for rehearing or, alternatively, for rehearing en banc and a majority of the en banc Court having voted to deny the petitions, it is

ORDERED that the en banc petitions be denied; and it is

FURTHER ORDERED for the division that the petitions for rehearing are denied.

Statement by Associate Judge GALLAGHER of reasons for not voting to grant appellee's petition for rehearing en banc: I agree with the government that the Hearing Division was in error in holding that the trial court impermissibly "amended" the indictment in this case. I do not consider, however, that my view on this requires a vote to go en banc on the issue. I say this, in particular, because I believe it will be a simple matter for the government to avoid a repetition of this decision in the future.

* Denotes division.

The government's problem, obviously, will be to draft its indictments so as to avoid a conclusion that it is "an unseverable, unitary charge" in a similar situation when the conjunctive is utilized. For example, if the burglary had been charged here as being an entry (a) with intent to steal and (b) with intent to assault, I doubt it could logically be considered a unitary charge. If I were to conclude that the government will have a serious problem on its hands on this score in the future or will be hampered by this decision, I would vote to go en banc on this issue. But I do not think so.

Statement by Associate Judge NEBEKER, with whom Associate Judge HARRIS concurs, of reasons for voting to grant appellee's petition for rehearing en banc: I voted to grant appellee's petition for rehearing en banc because I believe that, contrary to the panel's statement. *Whalen v. United States,* D.C.App. 379 A.2d 1152, 1157 (1977), the indictment here did charge the commission of one offense in two ways. The offense charged was burglary, which is defined by D.C.Code 1973, § 22–1801 as unlawful entry with intent to commit any criminal offense. The offense of burglary was thus charged in two ways, *i.e.*, with intent (1) to steal the property of another, and (2) to commit an assault.

The division's opinion declares that the indictment stated "an unseverable, unitary charge, stated in the conjunctive." *Id.* at 1157. I do not understand this statement, inasmuch as this count would have charged a valid, single violation of the burglary statute had the words "to steal the property of another" never been included. *See Vincent v. United States,* 337 F.2d 891 (8th Cir. 1964).

The thread on which the "unitary charge" holding seems to be based is the absence of a comma and the absence of a redundant "intent" in the indictment. I would suggest that it is more realistic to read the indictment in the same manner as the Supreme Court recently read statutory language involved in *Simpson v. United States,* —U.S.—, 98 S.Ct. 909, 912 n. 6, 55 L.Ed.2d 70 (1978), quoting from Judge McCree's separate opinion in *United States v. Beasley,* 438 F.2d 1279, 1284 (6th Cir. 1971):

> . . . In order to give lawful meaning to Congress' enactment of the aggravating elements in 18 U.S.C. § 2113 (d), the phrase 'by the use of a dangerous weapon or

> device' must be read, *regardless of punctuation,* as modifying both the assault provision and the putting in jeopardy provision. [Emphasis added.]

As the panel recognized, withdrawal from the jury's consideration of one alleged method of committing an offense is permissible. *Ford v. United States,* 273 U.S. 593, 47 S.Ct. 531, 71 L.Ed. 793 (1927); *Salinger v. United States,* 272 U.S. 542, 47 S.Ct. 173, 71 L.Ed. 398 (1926). Thus, it seems clear to me that the amendment here was proper. Moreover, the amendment did not broaden the charge or result in the defendant's having to defend against accusations not returned by the grand jury—which, I believe, was the evil from which *Ex parte Bain,* 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887) sought to protect defendants.

Although Judge Gallagher is correct in stating that this indictment problem will be an easy one for the government to avoid in the future, I think the conflict between the panel opinion and *Ford v. United States, supra,* and *Salinger v. United States, supra,* requires en banc consideration under D.C. App. R. 40.

SUPREME COURT OF THE UNITED STATES

No. 78-5471

Thomas W. Whalen,

Petitioner,

v.

United States; and

James E. Pynes,

Petitioner,

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the District of Columbia Court of Appeals.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion of Thomas W. Whalen for leave to proceed *in forma pauperis* be, and the same is hereby, granted; and the petition for writ of certiorari in *Whalen v. United States,* District of Columbia Court of Appeals case No. 8583 be, and the same is hereby, granted.

April 16, 1979

Mr. Justice Powell took no part in the consideration or decision of this petition.

☆ U.S. Government Printing Office: 1979—297-169/34

No. 78-5471

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

THOMAS W. WHALEN AND JAMES E. PYNES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JEROME M. FEIT
ELLIOTT SCHULDER
Attorneys
Department of Justice
Washington, D. C. 20530

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-5471

THOMAS W. WHALEN AND JAMES E. PYNES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals in petitioner Whalen's case (Pet. App. 1a-15a) is reported at 379 A. 2d 1152. The opinion of the court of appeals in petitioner Pynes' case (Pet. App. 18a-22a) is reported at 385 A. 2d 772.

JURISDICTION

The judgment of the court of appeals in petitioner Whalen's case was entered on November 10, 1977; a petition for rehearing was denied on July 14, 1978 (Pet. App. 16a). The judgment of the court of appeals in petitioner Pynes' case was entered on April 26, 1978; a petition for rehearing was denied on July 27, 1978 (Pet. App. 23a). The petition for a writ of certiorari was filed on September 25, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether the imposition of consecutive sentences for felony murder and the underlying felony violates the Double Jeopardy Clause in the circumstances of these cases.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *.

2. 22 D.C. Code 2401 provides in pertinent part:

> Whoever, * * * kills another purposely either of deliberate and premeditated malice * * * or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

3. 22 D.C. Code 2801 provides in pertinent part:

> Whoever has carnal knowledge of a female forcibly and against her will * * * shall be imprisoned for any term of years or for life.

4. a. 22 D.C. Code 2101 provides in pertinent part:

> Whoever shall be guilty of, or of aiding or abetting in, seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever, and holding or detaining, or with the intent to hold or detain, such individual for ransom or reward or otherwise * * * shall, upon conviction thereof, be punished by imprisonment for life or for such term as the court in its discretion may determine. * * *.

b. D.C. Code 3202 provides in pertinent part:

> (a) Any person who commits a crime of violence in the District of Columbia when armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon * * * —

> (1) may, if he is convicted for the first time of having so committed a crime of violence in the District of Columbia, be sentenced, in addition to the penalty provided for such crime, to a period of imprisonment which may be up to life imprisonment * * *.

STATEMENT

1. Whalen

Following a jury trial in the Superior Court of the District of Columbia, petitioner Whalen was convicted on two counts of felony murder (with rape and burglary as the underlying felonies), in violation of 22 D.C. Code 2401; second degree murder, in violation of 22 D.C. Code 2403; rape, in violation of 22 D.C. Code 2801; and first-degree burglary, in violation of 22 D.C. Code 1801(a). He was sentenced to concurrent terms of 20 years to life imprisonment on each felony murder count and 15 years to life imprisonment for second-degree murder, and to consecutive terms of 15 years to life imprisonment for rape and 10 to 30 years imprisonment for first-degree burglary. 1/

The evidence (the sufficiency of which petitioner does not contest) showed that on September 10, 1972, between 10:20 a.m. and 12:30 p.m., petitioner raped and strangled Rebecca Reiser in her room in the McLean Gardens apartment complex in Washington, D.C. (I Tr. 36, 52-58, 62-65; II Tr. 229). Petitioner, a maintenance worker at McLean Gardens,

1/ At the close of the government's case, the court entered a judgment of acquittal on a felony murder count and the underlying robbery count.

was in the general vicinty of the victim's building (II Tr. 123-124, 76-77, 84) and told his co-workers that he had engaged in intercourse with someone at McLean Gardens (II Tr. 136-137). Petitioner's fingerprint and palmprint were later found in the victim's room (III Tr. 326-327, 328-330; IV Tr. 500, 511-512, 521).

The court of appeals reversed the convictions for first-degree burglary and for felony murder in the perpetration of burglary because, it held, the indictment had been improperly amended (Pet. App. 4a-6a). It affirmed the convictions and consecutive sentences for rape and for felony murder in the perpetration of the rape, holding that, because the underlying felony is an "intent-divining mechanism" in the felony murder prosecution, and because the rape and felony murder statutes were meant to protect different "societal interests," the offenses did not merge (id. at 7a-9a). The court vacated the sentence for second degree murder after finding that it was a "lesser included offense of felony murder" (id. at 7a).

2. Pynes

After a jury trial in the Superior Court of the District of Columbia, petitioner Pynes was convicted of premeditated murder and felony murder (with kidnapping as the underlying felony), both in violation of 22 D.C. Code 2401, and of armed kidnapping, in violation of 22 D.C. 2101 and 3202. He was sentenced to concurrent terms of 20 years to life imprisonment on each of the murder counts and to a consecutive term of 15 years to life imprisonment for armed kidnapping.

The evidence established that on November 8, 1972, petitioner and Gregory Neal, who were then under indictment in Maryland for the robbery of Overton Bonner, met Bonner at his place of employment. They tricked him into their car by promising to return the money and property previously stolen from him if Bonner would agree not to testify against them at their robbery trial (I Tr. 261-262). Neal and petitioner then drove Bonner into Rock Creek Park, where they stopped at a picnic grove. Neal produced a gun and ordered Bonner out of the car (I Tr. 262). Outside the car, a struggle ensued between Neal and Bonner; petitioner ran over, grabbed the gun and fired twice at Bonner (I Tr. 262-263). After dropping Neal off at home, petitioner returned to the park and shot Bonner several more times to make sure he was dead (I Tr. 263).

The court of appeals affirmed petitioner's convictions (Pet. App. 18a-22a). The court upheld the consecutive sentences for armed kidnapping and for felony murder with kidnapping as the underlying charge, concluding that Pynes' case involved "not * * * a single transaction resulting in two crimes, but a series of interrelated acts resulting in two crimes which are defined by separate statutes that are not in pari materia" (id. at 19a). In addition, the court held that "the doctrine of merger is inapplicable because the transaction offended multiple societal interests and constituted separate offenses" (ibid.).

DISCUSSION

In each of these cases, the District of Columbia Court of Appeals upheld consecutive sentences imposed upon petitioners for a felony and for felony-murder committed during the course of that felony. The court found that it was the intent of Congress to allow separate punishment for the two offenses and that such action does not violate the Constitution. Petitioners mount no attack on the proposition that the imposition of cumulative punishment comports with the legislative intent. Rather, they contend that the underlying felony is a lesser included offense of felony-murder and that, by virtue of that fact, the Double Jeopardy Clause bars the imposition of cumulative punishments.

The general issue of the constitutionality of cumulative punishment for felony-murder and an underlying felony may be broken down into two components: First, is the underlying felony the "same" offense as felony murder for constitutional purposes (presumably on the basis that it is a lesser included offense); if it is not, then the question of the permissibility of cumulative punishments is purely one of legislative intent. Second, if the underlying felony is the "same" offense, so that successive trials would be barred by the Double Jeopardy Clause (Brown v. Ohio, 432 U.S. 161 (1977)), does the Clause also bar cumulative punishments even if the legislature intended to permit them.

Because the decision in this case appears to be in conflict with decisions of the District of Columbia Circuit and of several state supreme courts, and because decisions of this Court have left some uncertainty regarding the proper disposition of this constitutional issue, we do not oppose review in this case of the claim of petitioner Whalen. For reasons discussed below, we believe the issue is irrelevant to the proper disposition of petitioner Pynes' case and accordingly oppose his request for review.

1. Any inquiry into whether two offenses are the "same" for purposes of the permissibility of cumulative punishments must begin with a consideration of the applicability of the so-called "Blockburger test." See Blockburger v. United States, 284 U.S. 299 (1932). The test was originally articulated as a means of "identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction" (Iannelli v. United States, 420 U.S. 770, 785 n. 17 (1975)), and the constitutional significance of the test has never been fully fleshed out. In essence, the test provides that the criterion for determining identity of offenses is not the evidence actually adduced to prove the offenses in any particular case, but the elements of the offenses: if each offense requires proof of an element that the other does not, the offenses are considered separate under the Blockburger test.

It appears tolerably clear that if offenses are different under the Blockburger test, there is no constitutional impediment to imposition of cumulative punishment so long as such action is consonant with legislative intent. See Gore v. United States, 357 U.S. 386, 392 (1958). If, on the other hand, application of the test leads to the conclusion that the offenses are the same, the constitutional consequences are less clear. In Brown v. Ohio, supra, 432 U.S. at 166, a case involving successive trials, the Court described the Blockburger test as "[t]he established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment * * *." See also Simpson v. United States, 435 U.S. 6, 11 (1978).

Despite the dictum in the Brown opinion, the plurality opinion in Jeffers v. United States, 432 U.S. 137 (1977), handed down

the same day as Brown and concurred in by the author of Brown, seems to suggest that the constitutionality of cumulative punishment for a greater and a lesser included offense is an open question. "The critical inquiry is whether Congress intended to punish each statutory violation separately. * * * * If some possibility exists that the two statutory offenses are the 'same offense' for double jeopardy purposes, however, it is necessary to examine the problem closely, in order to avoid constitutional multiple punishment difficulties." 432 U.S. at 155. Because the Court in Jeffers concluded that Congress did not intend to permit multiple punishments for the offenses there under examination, it was deemed "unnecessary to reach the lesser included offense [punishment] issue" (ibid.).

2. The question whether the legislature may authorize multiple punishment for offenses that -- like rape and felony-murder -- appear quite distinct as a matter of legislative policy but may prove to be the "same" upon subjection to an abstract test evolved by the judiciary arises only if the judicial test in fact classifies the two offenses as the "same" under the particular statutory scheme and other pertinent circumstances of a particular case. 2/

At first blush (and, we believe, upon final analysis), application of the Blockburger test to offenses such as rape and felony-murder appears to lead to the conclusion that the offenses are different. Carnal knowledge is an element of the former but not the latter, whereas felony-murder requires a killing and rape does not.

2/ The question also need not be reached, of course, if, as in Simpson and Jeffers, the legislative history evidences an intent not to permit imposition of cumulative punishment. Here, however, the court of appeals concluded that the felony-murder statute and the rape (or, in Pynes' case, kidnapping) statute were meant to protect distinct social interests and that the imposition of cumulative punishments thus accorded with the congressional intent. We do not understand petitioners to challenge this conclusion; rather, they contend it is irrelevant to the constitutional multiple punishment issue.

Petitioners apply the Blockburger test in a somewhat different manner. Although each offense is defined to include an element that the other does not, they point out, correctly, that a jury could not convict of felony-murder without necessarily finding the defendant to have committed an underlying felony. Thus, they reason, (a) the felony is a lesser included offense of felony murder, (b) a lesser included offense is the "same" offense for double jeopardy purposes as the greater offense, and therefore (c) the two offenses are not different under the Blockburger test and may not be cumulatively punished. Pet. 7-8.

Whether our view or that of petitioners is correct depends upon whether all lesser included offenses are ipso facto the "same" as the greater offense under the Blockburger test, regardless of identity of elements, or whether only necessarily included offenses are the "same". We believe that the latter approach, which clearly produces more sensible results in cases like this (see also point 3, infra), is preferable. There is, however, some support for petitioners' view in this Court's summary reversal in Harris v. Oklahoma, 433 U.S. 682 (1977), which barred a successive trial for the underlying felony after a conviction for felony-murder.

We believe that the result in Harris, which was decided summarily and without any extended analysis of what is a conceptually complex issue, would bear reexamination. In any event, Harris is not necessarily controlling here, because this case involves the Double Jeopardy Clause's restriction against multiple punishments, not successive trials. These two distinct aspects of the Clause involve different interests, and offenses that are deemed the "same" for purposes of barring successive trials may not be so for punishment purposes. As the Court noted in Brown v. Ohio,

supra, 432 U.S. at 165 "the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial." Of course, the legislature is no more free than other branches to circumvent the Clause's prohibition against successive trials for the same offense. The legislature may, however, legitimately "circumvent" the prohibition against cumulative punishment for the same offense simply by enhancing the punishment for crimes committed under aggravating circumstances. [3/] Thus a substantial question arises whether offenses that are conceptually the "same" for successive trial purposes should automatically be characterized as the "same" for purposes of imposition of punishment.

3. If petitioners are correct that double jeopardy principles bar multiple punishments whenever the commission of one of a class of offenses is a predicate to conviction of a second offense, the principle would have significant consequences considerably beyond its impact on felony-murder cases. Perhaps the most obvious instance is 18 U.S.C. 924(c), which bars the use of or unlawful carrying of a firearm in the commission of any federal felony. In order to convict for an offense under that provision, the jury necessarily must find the commission of an underlying felony. Thus, under petitioners' analysis, the predicate felony is a "lesser included offense" of the firearms charge, and cumulative punishments,

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3/ For example, the legislature could provide that whoever kills another while committing a felony shall be sentenced to a minimum term of from 20 to 35 years' imprisonment and a maximum of life imprisonment. This would accomplish exactly the same result as the present scheme yet would appear to be immune from attack on double jeopardy grounds.

although expressly mandated by Congress, would apparently be constitutionally barred. The same problem may arise with a number of other federal statutes. E.g., 18 U.S.C. 1962 (conduct of enterprise through a pattern of racketeering activity); 21 U.S.C. 848 (continuing criminal enterprise involving substantive narcotics offenses).

Petitioners' position would also render felony-murder statutes virtually useless in many cases (except where the death penalty may be sought). Under the federal statutory scheme as well as that of most states, the presence of the underlying felony serves the narrow function of elevating what would otherwise be second-degree murder into first-degree murder without the necessity of proof of premeditation. See, e.g., 18 U.S.C. 1111(a). If a conviction for felony-murder bars punishment for the underlying felony, the bringing of a felony-murder charge would often actually diminish the amount of punishment to which the defendant is exposed as compared to charging the underlying felony and second-degree murder (which two charges could, even under petitioners' theory, be cumulatively punished). Thus the rule for which petitioners contend subverts the legislative policy of treating murders committed in the course of a felony more seriously than others.

4. While we believe that the decision of the court of appeals is correct, the foregoing discussion indicates that it involves a question of some importance and difficulty that has not been directly addressed or clearly resolved by prior decisions of this Court. In addition, as petitioners correctly note (Pet. 10), the decision conflicts with the disposition of the same issue by the District of Columbia Circuit (e.g., United States v. Greene, 489 F. 2d 1145 (1973), cert. denied, 419 U.S. 977 (1974)); the issue is also the subject of conflicting decisions on federal constitutional grounds among state supreme courts (see cases cited at Pet. 11-12). This disagreement further suggests the propriety of review by this Court.

5. Only the case of petitioner Whalen properly presents this issue for review. Petitioner Pynes was convicted not only of felony-murder, but also of first-degree murder for the same slaying. He received identical concurrent sentences on both murder counts. He does not attack the validity of his first-degree murder conviction, and he could not and does not suggest that armed kidnapping, for which he received a consecutive sentence, is a lesser included offense of first-degree murder. Under these circumstances, the only relief to which he would be entitled would be vacation of the felony-murder conviction. While we believe that the court of appeals should have done this, its failure to do so is of no practical consequence and presents no occasion for review by this Court.

6. Petitioner Whalen's situation is different. He was convicted of rape, felony-murder, and second-degree murder and given sentences totalling 35 years to life imprisonment. His second-degree murder conviction (on which he was sentenced to 15 years to life) was vacated by the court of appeals solely on the ground that it was a lesser included offense of felony-murder (on which he received a concurrent term of 20 years to life). Petitioner now seeks to have the consecutive sentence on the rape charge eliminated. If he is correct that rape and felony-murder are the "same" offense for multiple punishment purposes, the proper course for the court of appeals would have been to vacate the felony-murder conviction and uphold the rape and second-degree murder convictions and sentences. If this Court now agrees with petitioner Whalen and rejects the holding of the court of appeals, it should vacate the judgment of the court of appeals and remand the case, pursuant to 28 U.S.C. 2106, for the purpose of allowing reinstitution of the second-degree murder conviction and sentence.

We note in closing that, at least in the context of felony-murder cases, this decision would have little practical impact in the federal system because of the governing parole statute (18 U.S.C. 4205(a)), which provides that in the case of any sentence or sentences cumulating to more than a maximum of 30 years, the prisoner is eligible for parole after 10 years (obviously the parole release decision itself would not be influenced by the technical "same offense" concepts at issue here, but rather by the conduct underlying the conviction). Because petitioner Whalen has been convicted of offenses under the District of Columbia Code, however, Section 4205(a) is inapplicable, and the outcome of this case would determine whether he must serve a minimum of 30 or of 35 years before becoming eligible for parole.

CONCLUSION

We do not oppose grant of Whalen's petition. The petition of Pynes should be denied.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JEROME M. FEIT
ELLIOTT SCHULDER
Attorneys

MARCH 1979

IN THE
Supreme Court of the United States
October Term, 1979

No. 78-5471

THOMAS W. WHALEN,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF FOR PETITIONER

SILAS J. WASSERSTROM
WILLIAM J. MERTENS
W. GARY KOHLMAN
Public Defender Service for the District of Columbia
451 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 628-1200

Counsel for Petitioner

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals affirming the petitioner's conviction is reported at 379 A.2d 1152 (1977). A copy of that opinion appears as Appendix A to the Petition for a Writ of Certiorari. The separate Order of that Court denying Mr. Whalen's Petition for Rehearing is reported at 388 A.2d 894 (1978). A copy of the Order appears as Appendix B to the Petition for a Writ of Certiorari.

JURISDICTION

The judgment of the Court of Appeals affirming the conviction was entered on November 19, 1977. A timely Petition for Rehearing was denied on July 14, 1978. The Petition for Writ of Certiorari was filed on September 25, 1978. Certiorari was granted on April 16, 1979. On May 21, 1979, the Clerk extended the time for filing petitioner's brief until June 30, 1979. The jurisdiction of this Court rests upon 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether consecutive sentences can be imposed for felony-murder (rape) (22 D.C. Code §2401, 22 D.C. Code §2404) and the same rape charged and proved as the predicate for the felony-murder.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * Nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb.* * *

22 D.C. Code 2401 provides:

> Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

22 D.C. Code 2404 provides in pertinent part:

> * * * Notwithstanding any other provision of law, a person convicted of first degree murder upon whom a sentence of life imprisonment is imposed shall be eligible for parole only after the expiration of twenty years from the date he commences to serve his sentence.* * *

STATEMENT OF THE CASE

The petitioner was tried by a jury in the District of Columbia Superior Court on a seven-count indictment. The evidence at trial—the sufficiency of which is not at issue here—showed that all of these charges grew out of a single incident which occurred on the morning of September 10, 1972.

On January 16, 1974, he was convicted on two counts of felony-murder (with rape and burglary as the underlying felonies), in violation of 22 D.C. Code 2401; second-degree murder, in violation of 22 D.C. Code 2493; rape, in violation of 22 D.C. Code 2801; and first-degree burglary, in violation of 22 D.C. Code 1801(a). On March 4, 1974, he was sentenced to concurrent terms of 20 years to life imprisonment on each felony-murder count and 15 years to life imprisonment for second-degree murder, and to consecutive terms of 15 years to life imprisonment for rape and 10 to 30 years imprisonment for first-degree burglary.

On appeal to the District of Columbia Court of Appeals, that Court reversed the convictions for first-degree burglary and for felony-murder in the perpetration of burglary becuase, it held, the indictment had been improperly amended. It affirmed the convictions and consecutive sentences for rape and for felony-murder in the perpetration of the rape, holding that, because the underlying felony is an "intent-divining mechanism" in the the felony murder prosecution, and because the rape and felony murder statutes were meant to protect different "societal interests," cumulative punishment could be imposed. The court vacated the sentence for second degree murder after finding that it was a "lesser included offense of felony murder". On April 16, 1979, this Court granted the Petition for a Writ of Certiorari challenging the permissibility of this cumulative punishment.

SUMMARY OF THE ARGUMENT

Where one offense is a lesser included offense of another, they are "the same" within the meaning of the Double Jeopardy Clause of the Fifth Amendment. *Brown* v. *Ohio*, 432 U.S. 161 (1977). The felony charged as the predicate for a felony-murder is an element of it, and thus is a lesser included offense. *See Harris* v. *Oklahoma*, 433 U.S. 682 (1977). Consequently, the consecutive sentences imposed on the petitioner upon his conviction for felony-murder (rape) and for the underlying rape constituted double punishment in violation of his right not to be punished twice for the same offense.

Nor did Congress intend for the person convicted of felony-murder to be doubly punished. To begin with, it is at least as reasonable to believe, contrary to the view of the Court of Appeals, that the felony-murder rule includes in its zone of protection those interests also protected by the statute proscribing the particular underlying felony. More important, the relevant legislative history affirmatively demonstrates that Congress intended that the penalty for

first-degree murder—which even after the annulment of the death penalty provision remains by far the harshest to be found in the District of Columbia Code—would be the only penalty for the commission of a felony-murder. Thus, while petitioner would argue that, at the least, the Double Jeopardy Clause requires clear and convincing evidence that Congress intended double punishment before it could constitutionally be imposed, here such punishment is palpably in conflict with Congress' intent.

ARGUMENT

THE CUMULATIVE PUNISHMENT IMPOSED HERE FOR FELONY-MURDER (RAPE), AND FOR THE SAME RAPE THAT WAS CHARGED IN THE INDICTMENT AS THE PREDICATE FOR THAT FELONY-MURDER, WAS IMPROPER BECAUSE IT (i) CONSTITUTED IMPERMISSIBLE DOUBLE PUNISHMENT IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT AND (ii) WAS NOT AUTHORIZED BY CONGRESS.

I. The Consecutive Sentences Imposed On The Petitioner Subjected Him To Double Punishment In Violation Of His Fifth Amendment Right Not To Be Twice Put In Jeopardy For The Same Offense.

The petitioner argued in the District of Columbia Court of Appeals that the consecutive sentences imposed by the trial court for felony-murder rape (20 years to life) and for the underlying rape (15 years to life) constituted double punishment in violation of the Fifth Amendment guarantee against double jeopardy. In its opinion, the Court of Appeals all but ignored this argument, and instead concluded that because it found "nothing to suggest" that Congress intended a single punishment for these offenses, cumulative punishment was permissible. As we will show in Part II of this brief, that court's analysis with respect to Congressional intent was conceptually misguided and it ignored critical legislative history. As a result, its conclusion with respect to that intent was simply wrong. But even more fundamentally, the court was wrong even to consider the question of congressional intent given its conclusion that the rape charged was but an element—and hence a lesser included offense—of the felony-murder. Since, as we will show in Part I of this brief, the two offenses are in fact the same, and hence that cumulative punishment was unconstitutional, the issue of congressional intent need not have been reached at all.[1]

[1] Of course, if the Court of Appeals had concluded that cumulative punishment was not intended by Congress, it would not have had to consider whether the offenses were "the same" for constitutional purposes. Similarly, if this Court concludes that the Court of Appeals was wrong with respect to legislative intent, it would not have to reach the constitutional issue addressed in Part I. *See, e.g., Simpson* v. *United States*, 435 U.S. 121 (1978); *Jeffers* v. *United States*, 432 U.S. 137, 155 (1977) Blackmum, J.). In his brief, petitioner does not enjoy the luxury of avoiding the constitutional issue; for it is conceivable that this Court will not agree with his analysis of congressional intent in Part II, *infra*.

The petitioner's argument that the consecutive sentences imposed here violated his right not to be punished twice for the same offense is both straight forward and compelling. It can best be stated in syllogistic form: When one offense is a lesser included offense of another, they are, for double jeopardy purposes, "the same" offense for which only one punishment can be imposed; the rape charged here in count 5 of the indictment is a lesser included offense of the felony-murder charged in count 1 of the indictment; therefore cumulative punishment for felony-murder (rape) and the underlying rape constitutes impermissible double punishment for the same rape offense.

While the Court of Appeals erroneously failed even to address this argument, in its Response to the Petition for a Writ of Certiorari, the government first questions each of these premises, and then contends that even if they are correct, the conclusion of unconstitutionality which would seem to flow inexorably from them, should nevertheless be rejected. We will discuss each of these premises, and the government's counter to them, in turn.

A. When One Offense Is A Lesser Included Offense of Another, They Are The Same Offense Under The Fifth Amendment.

As this Court said in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), the Fifth Amendment guarantee against double jeopardy

> . . . protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense. *Id.* at 717.

Consequently, in the context of both multiple trials and multiple punishment, it is always essential, but not always easy, to determine whether the alleged offenses were in fact the same.

Of these various tests formulated by the courts to effect this determination of "sameness," the so-called "*Blockburger*" test, has now gained clear ascendency. *See Blockburger* v. *United States*, 284 U.S. 299 (1932). That test provides, in essence, that if each offense charged requires proof of an element that the other does not, the offenses are distinct. But, conversely, if each offense does not contain an element that the other does not, then they are not "sufficiently distinguishable to permit the imposition of cumulative punishment. . . ." *Brown* v. *Ohio*, 432 U.S. 161, 166 (1977). While, as the government points out, this test may have been articulated in *Blockburger* itself "as a means of identifying congressional intent," (Response, p. 7) its venerable precursors were clearly constitutionally based, *See, e.g., In re Neilson*, 131 U.S. 176 (1889). More to the point, it has, in recent times, been explicitly and consistently utilized by this Court as a constitutional test:

> The *Blockburger* test has its primary relevance in the double jeopardy context, where it is a guide for determining when two separately defined crimes constituted the "same offense; for double

jeopardy purposes." *Simpson* v. *United States*, 435 U.S. 6, 11 (1978).

See also Brown, supra, at 166. While *Blockburger* may be but a threshold test with respect to successive trials,[1] it is now the constitutional test with respect to cumulative punsihment:

> The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger* v. *United States.*" *Brown* v. *Ohio*, 432 U.S. at 166.

Under this test, then, it would seem that the paradigmatic case of "same offenses" for which cumulative punishment could not be imposed would be that of the greater offense and its lesser included offenses; for by definition a lesser included offense contains no element not contained in the greater. And, indeed, this principle, acknowledged by this Court at least 90 years ago in *In re Neilson, supra*, at 188, was explicitly reaffirmed in *Brown* v. *Ohio*, 432 U.S. at 168:

> As is invariably true of a greater and lesser included offense, the lesser offense . . . requires no proof beyond that which is required for conviction of the greater. . . . The greater offense is therefore by definition the "same" for purposes of double jeopardy as any lesser offense included in it.

[1] While the *Blockburger* test establishes the necessary conditions for cumulative punishment, successive trials may be barred in some circumstances even where offenses are different under *Blockburger*. *See Brown, supra*, 432 U.S. at 166-67, n.6.

See also Harris v. *Oklahoma*, 433 U.S. 682 (1977).

It would seem to be beyond cavil, then, that since an offense and its lesser included offense are the same for Fifth Amendment purposes, consecutive punishment for each violates the double jeopardy guarantee against multiple punishment.

In its Response the government blithely characterizes the statements in *Brown* with respect to cumulative punishment as dictum, presumably because *Brown* involved punishments imposed for lesser and greater offenses at successive trials. Response, p.8. But the Court in *Brown* clearly perceived the question of cumulative punishment as squarely before it. In fact, the Court in *Brown* reached its conclusion as to separate punishments imposed at successive trials by arguing from the illegality of such punishments imposed at a single trial:

> If two offenses are the same under this test for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions. 432 U.S. at 166.

Consequently its statement with respect to the unconstitutionality of separate punishments for a greater and lesser included offense imposed at a single trial is not merely dictum.

Moreover, the "openness" of the question of the constitutionality of cumulative punishments for a greater and a lesser included offense is illusory. The

uncertainty is alleged to flow from the plurality opinion in *Jeffers* v. *United States*, 432 U.S. 137 (1977), which, the government points out, was decided the same day as *Brown*, and concurred in by *Brown's* author. In *Jeffers*, the government contends, the plurality deemed it "unnecessary to reach the lesser included offense [punishment] issue" because it concluded that Congress did not intend to permit multiple punishment for the offense at issue there. This is true but irrelevant. For a careful reading of *Jeffers* reveals that the "lesser included offense" issue which the Court felt it was "unnecessary to reach" was not, as the government implies, the question of whether consecutive punishment could be imposed for a greater and lesser included offense. Rather, the unreached issue was whether the offenses charged in *Jeffers*, 21 U.S.C. §848 and 21 U.S.C. §846, did in fact stand in a greater and lesser included offense relationship to one another.[3] There is, then, no reason whatever to doubt that the author of *Brown*, writing for the Court, meant just what was said there: that a greater and

[3] What the court said is that its conclusion with respect to congressional intent "*again* makes it unnecessary to reach the lesser included offense issue." (emphasis added). 432 U.S. at 155. And the issue that the Court had earlier grappled with, and found it unnecessary to decide, was that of whether §846 was a lesser included offense of §848. This turned on the highly technical question of whether acting "in concert" necessarily presupposed a conspiracy. *Id.* at 149-151, and 152, n.20: ". . . it was by no means settled law that §846 was a lesser included offense of §848 . . . Even now, it has not been necessary to settle that issue definitively." This, then, is clearly the issue that the plurality referred to as "*again* unnecessary to reach."

lesser included offense are the same for double jeopardy purposes, and that cumulative punishment for such offenses is unconstitutional.

B. The Rape (Count 5) That Constituted The Predicate For Conviction of Felony Murder-Rape (Count 1) Was A Lesser Included Offense of It.

The petitioner was charged in count 5 with rape, and in count 1 with felony murder premised on that same rape. Consequently the jury could not convict on count 1 unless it found that the petitioner committed the underlying felony. The rape, then, was a lesser included offense—an element—of the greater offense, felony murder: ". . . it seems to us very clear that where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." *In re Nielson*, 131 U.S. at 188.

This general principle was recently applied by this Court to the precise question at issue here: whether an underlying felony is a lesser included offense of a felony-murder premised on it. *Harris* v. *Oklahoma*, *supra*. In *Harris*, the Court unanimously ruled that the felony predicate (there, robbery by firearms), for a felony murder charge, is a lesser included offense of that murder charge. *See also State* v. *Cooper*, 13 N.J. 361 (1833) cited with approval in *Brown*, *supra*, at

168, and cases cited in the Petition for Writ of Certiorari in the present case at p.11. The United States Court of Appeals for District of Columbia Circuit has also ruled that the felony is a lesser included offense. *Green* v. *United States*, 489 F.2d 1145, 1158 (D.C. Cir. 1973), *cert. denied* 419 U.S. 977 (1974). Indeed, the court below here acknowledged that the "underlying felony is an element of felony murder." Nevertheless it went on to assert that it was not a lesser included offense of felony murder because different "societal interests are served by each statute," and because "[w]e find nothing in the legislation to suggest that Congress intended the underlying offense to be nonprosecutable under the merger rule . . ." 379 A.2d at 1159.[4]

[4] Although the Court of Appeals acknowledged that "the underlying felony is an element of felony murder," it attempted to avoid the double jeopardy consequences of this fact by then characterizing the felony as "an intent-divining mechanism." 379 A.2d at 1160. The underlying felony, wrote the Court, "permits the jury to infer the requisite intent" that would otherwise require more direct proof. *Id.* at 1159. Although the Court was thus using the language of permissive inferences, it is clear that this has never been the function of the underlying felony and it is equally clear that the court was not attempting to re-define the elements of felony-murder, which has, of course, never required proof of actual intent. Under the nonpurposeful felony murder provision contained in 22 D.C. Code §2401, as with most felony murder statutes, the felony is proved not as a means of proving the defendant's actual state of mind. Rather, it relieves the state of the burden of proving that state of mind. Its effect, therefore, is to render actual state of mind irrelevant. The defendant may not escape punishment for first degree murder even if he can affirmatively show that he lacked the mental element—

As we show in Part II, the Court's approach was misguided, and its conclusions simply wrong. Not surprisingly, the government, in its Response does not rely heavily on the lower court's opinion; indeed, it scarcely mentions it. Rather, the government suggests, rape is not a lesser included offense of felony murder because, viewed in the abstract, felony murder does not require proof of carnal knowledge, as rape does. It argues that because the underlying felony for felony-murder can be one of several enumerated felonies, the felony-murder statute itself does not require

premeditation and malice—otherwise necessary for first degree murder. Indeed, it is first degree murder even if the killing was accidental. *E.g.*, *Mumforde* v. *United States*, 130 F.2d 411, 413 (D.C. Cir.), *cert. denied*, 317 U.S. 656 (1942).

The Court below did not depart from that long-standing rule but was merely endeavoring to explain the decision it had reached by means of a legal fiction. This is clear, for shortly after the opinion in *Whalen*, another panel of the Court of Appeals recognized that, in a felony-murder prosecution, "proof of the felony *substitutes for* premeditation and deliberation by legislative fiat." *Pynes* v. *United States*, 385 A.2d 772, 773 (D.C. Ct. App. 1978) (emphasis supplied).

Indeed, elsewhere in its opinion in the present case, the Court of Appeals treated the underlying felony as a lesser included offense of felony-murder, when it held that reversal of petitioner's burglary conviction necessitated reversal of his conviction for felony-murder (burglary) as well. The Court of Appeals, then, like the Ohio Supreme Court in *Brown*, *supra*, in effect found that the underlying felony is a lesser included offense of felony-murder, but, again like the Ohio court in *Brown*, nonetheless permitted cumulative punishment. 379 A.2d at 1157 n.2.

proof of any specific felony. The government puts it this way:

> Whether our view or that of the petitioner is correct depends upon whether all lesser included offenses are *ipso facto* the "same" as the greater offense under the *Blockburger* test, regardless of identity of elements, or whether only necessarily included offenses are the "same." (Response, p.9). (Emphasis in original).

A more accurate way to put it, however, would be to ask whether two offenses are "the same" when the *indictment* itself demonstrates that proof of one offense charged will necessarily involve proof of the other, or whether they are the same only if proof of violation of one *statute*, viewed in the abstract, would necessarily require proof of another.

As with its contention with respect to the "sameness" of lesser included offenses generally, the government here too seems to be maintaining at best a rear guard action in the face of clearly controlling precedent. *See Harris* v. *Oklahoma*, *supra*. But, undaunted, it suggests that this Court re-examine its unanimous holding of two terms ago in *Harris*, *supra*, and then, as with its approach to *Brown*, seeks to distinguish *Harris* as involving successive trials, not cumulative punishment imposed at a single trial. But while this Court has recognized the disparate interests protected by the double jeopardy guarantee, it has, wisely, never introduced still further complexity to an already difficult area of the law by defining the

single constitutional phrase "same offense" differently with respect to each of the interests which the clause protects. And it has not applied *Blockburger* as requiring that two offenses be identical in law and fact to be the same for purposes of the Fifth Amendment.[8] As the Court said in *Brown:*

> It has long been understood that separate statutory crimes need not be indentical—either in constituent elements or in actual proof—in order to be the same within the meaning of the constitutional prohibition. 432 U.S. at 164.

Moreover, the government's sophistic approach—viewing the statutes involved in the abstract, not the offenses actually charged in the indictment—does not, as the government maintains, "clearly produce more sensible results in cases like this." Indeed, it would produce utterly absurd results. For example, suppose the defendant is charged with a first or second degree murder by shooting. Surely all would agree that an assault with intent to kill immediately preceeding the pulling of the trigger is quintessentially a necessarily lesser included offense of the murder for which cumulative punishment could not be imposed. But on the government's theory, it would not be a *necessarily*

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[8] It is true that overlapping proof at trial will not necessarily make two offenses "the same." *See, e.g., Blockburger, supra.* But where, as here, the indictment itself demonstrates that proof of one offense will necessarily (not just coincidentally) require proof of the other, this Court has treated them as the same. *See, e.g., Jeffers* v. *United States*, 432 U.S. 137 (1977) (Blackman, J.), discussed *infra.*

included offense. In the District of Columbia, to kill another by poisoning is, not surprisingly, murder. Such a murder would not, however, involve an actual assault. *See* 22 D.C. Code §501. Hence it is possible to commit a murder without an assault with intent to kill. And, of course, it is possible to commit an assault with intent to kill without actually killing anyone. On the government's theory this would mean that assault with intent to kill is never a necessarily included offense of murder, whatever the nature of the murder actually charged in the indictment. Such nonsensical results, and the cramped approach championed by the government which would produce them, have been rejected by this Court. For it is the *offense* charged in the indictment,[6] not the *statutes* viewed in the abstract, which this Court has treated as dispositive with respect to whether two offenses are the same.[7]

[6] This Court has recognized that "the manner in which an indictment is drawn cannot be ignored" because "an important function of the indictment" is to shield the accused from potential double jeopardy. *Sanabria* v. *United States*, 437 U.S. 54, 65-66 (1978), and cases cited therein. This is one of the reasons for requiring specificity in the indictment. *See, e.g., United States* v. *Tanner*, 471 F.2d 128, 139 (7th Cir.) *cert. denied* 409 U.S. 949 (1972); 8 Moore, *Federal Practice* ¶8.03[1]. Here, the indictment would have been insufficient if it had not specified the felony on which the government based its felony-murder count. *Cf. United States* v. *Seeger*, 445 F.2d 232 (D.C. Cir. 1971) (where burglary is charged, the offense which the accused intended to commit must be specifically alleged in the indictment.)

[7] The relevance to double jeopardy of the proof actually adduced at trial is a much brooded question. *See, e.g., Note*, 7 Balt. L. Rev. 345 (1978), which discusses the various tests which have been formulated by the courts to discern whether two offenses are the same. But certainly where, as here, the indictment itself demonstrates that one offense must necessarily be proved in proving the greater offense, the offenses should be considered the same for Fifth Amendment purposes.

This was clearly so in *Harris, supra*, and *Brown, supra*. It is also implicit in *Jeffers, supra*. In *Jeffers*, The Court had to decide whether 21 U.S.C. §846, which proscribes conspiracy to commit offenses defined in a particular subchapter of 21 U.S.C. §841, was a lesser included offense of 21 U.S.C. §848 which proscribes, in essence, managing a continuing criminal enterprise. Section 848 then goes on to define a person engaged in such an enterprise as one who violates any provision of either of two separate subchapters of 21 U.S.C. §841 in concert with at least five other people with respect to whom he occupies a supervisory position. Jeffers was charged with conspiracy under §846 and, in a separate indictment, with conducting a continuing criminal enterprise under §848. The conspiracy charged under §846 was, it appears from the indictments, to commit the same substantive offenses which were the predicates for the continuing criminal enterprise charge. *See* Joint Appendix, *Jeffers* v. *United States*, pp.3 and 6. Jeffers objected to consolidating the indictments, and was tried, and convicted, on each of them separately. Cumulative sentences were imposed.

Four dissenting justices felt that §846 clearly was a lesser included offense of §848 for which the defendant could neither be successively tried nor cumula-

tively punished. 432 U.S. at 158. In his opinion for the four judge plurality, Justice Blackum dealt at some length with the issue of whether §846 was a lesser included offense of §848. In doing so, he alluded to the fact that "the two indictments in this case are remarkably similar in detail. It is clear that the identical agreement and transactions over the identical time period were involved in the two cases." *Id.*, at 150 n.16. As the plurality saw it, the lesser included offense issue turned on whether the "in concert" requirement of §848 presupposed a conspiracy. Assuming (without deciding) that it did, the Court concluded that §846 is a lesser included offense of §848:

> So construed, §846 is a lesser included offense of §848, because 848 [construed as requiring a conspiracy] requires proof of every fact necessary to show a violation under §846 as well as proof of additional elements. *Id.*, at 150.

Nevertheless, the Court did not have to decide definitively the question of whether §848 did presuppose of conspiracy because it concluded, with respect to successive trials, that Jeffers had waived his double jeopardy right, and, with respect to consecutive fines, that they were impermissible because Congress did not intend cumulative punishment.[8]

For the dissenters, then, it was clear that §846 was a lesser included offense of §848, while for the plural-

[8] Because Jeffers was sentenced to life in prison without possibility of parole on the §848 conviction, it was only the consecutive fines that had any practical significance.

ity this was a difficult issue which it found it unnecessary to decide. But on the government's theory, the case should not have been hard at all, the issue should not have been the meaning of "in concert", and the Court should have been utterly indifferent to the indictments. For on the government's approach, §846 plainly is not a lesser included offense of §848 because, as with felony murder, any one of a range of predicate offenses *could have been* charged to establish the §848 violation. These offenses *could have been* different from those the defendant was alleged to have conspired to commit under §846. Indeed, they *could have been* from a subchapter to which §846 did not even apply. On the government's wistful theory, it is what might have been, not what is, that is determinative. Thus it should have been completely irrelevant to the Court that the same offenses were *in fact* named in the conspiracy charge and as predicates for the §848 charge, for they could have been different.[9]

But, clearly, the indictment was not irrelevant to either the dissenters or the plurality in *Jeffers*. Indeed, on the assumption that "in concert" presup-

[9] In its brief in *Jeffers*, the government's argument was similar to, but more restrained than, its suggestion here. There it maintained only that §846 was not a lesser included offense of §848 because the actual predicate offenses charged in the §848 count were not conpiracies. Indeed, it even intimated that the offenses actually charged as predicates would be lesser included offenses. *See* Brief for the United States, *Jeffers* v. *United States*, p.31. Here, of course, the issue is whether the rape actually charged and relied on as the felony murder predicate, is a lesser included offense of it.

posed conspiracy, it was dispositive. In the present case, no assumptions are necessary, for the offenses charged here do not involve subtle words of art, and the indictment plainly established the lesser included offense relationship between the rape charged in count 5 and the felony-murder charged in count 1 which is predicated on that same rape.

C. Because The Rape And Felony-Murder Predicated On It Are The Same Offense, The Cumulative Punishment Imposed Was Unconstitutional.

As petitioner has shown, a greater and lesser included offense are the same for purposes of the Fifth Amendment. Petitioner has also shown that the rape of which he was convicted here was a lesser included offense of the felony murder for which proof of the same rape was an indispensable element. Nevertheless, the government suggests, the Court should reject the apparently ineluctable conclusion that the consecutive punishments imposed here were unconstitutional. Instead, this Court should hold that the propriety of consecutive punishments, even for the same offense, turns exclusively on legislative intent. If the legislature wants the court to punish twice for the same offense, then the courts must do so, because, the government argues, the legislature could accomplish equivalent results through its virtually unlimited power to fix sentences and to provide for enhanced punishments where specified factors are present. Response, p.10.

This startling proposal, which asks the Court to ignore the plain language of the Constitution and over a hundred years of precedent, has nothing to commend it, and should be rejected. To begin with, even if the legislature can accomplish a given result in a certain way, it does not follow that it is therefore constitutionally free to accomplish an equivalent result in a different way, particularly where, as here, these differences implicate the judicial process. *Cf. Mullaney* v. *Wilbur*, 421 U.S. 624 (1974); *Patterson* v. *New York*, 432 U.S. 197 (1977); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974). And here, there is an important symbolic, if not consequential, difference between punishing a person twice for the same offense, and punishing him once—albeit more severely—for that offense. While the legislature is generally free to authorize the judiciary to do the latter, it cannot require the courts to do the former.[10] For, as this Court has recognized, it is simply unfair to punish twice for the

[10] Conceivably, a legislative scheme which appeared to authorize cumulative punishment for a "greater" and lesser included offense as defined under the *Blockburger* test, would, upon examination of the legislative history and relative length of the sentences authorized, be so closely akin to traditional enhancement provisions that it could be said not to entail double punishment. *See, e.g.*, 18 U.S.C. §924(c) where the "greater" offense carries a shorter term than the vast bulk of the predicate felonies which may underlie it.

same offense, irrespective of the penalty actually imposed:[11]

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. . . . [T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offenses as from being twice tried for it. *North Carolina* v. *Pearce*, 395 U.S. 711 (1969) quoting *Ex Parte Lange*, 18 Wall. 163, 168 and 173 (1874).

Moreover, the government's argument here is really no more than a radical variant of its argument that "same offense" for purposes of cumulative punishment should be defined differently than "same offense" for purposes of successive trials: that, in fact, "same offense" for cumulative punishment purposes means, effectively, whatever the legislature says it should mean. This suggestion is at odds both with the plain language of the Fifth Amendment and with a substantial body of controlling case law. Indeed, if the government were correct in its contention that legislative intent is all there is, this Court has squandered a good deal of time and effort seeking sometimes to elucidate, and other times to avoid, a constitutional chimera.

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[11] This is so even where, as in *Pearce*, the aggragated "double punishment" was still less than the single maximum sentence that could have been imposed. *See Pearce* v. *North Carolina*, *supra*, 395 U.S. at 719 n.14

For example, in *Simpson* v. *United States*, *supra*, eight justices of this Court felt that there really was a constitutional issue separate and apart from that of whether Congress intended to permit consecutive punishments under 18 U.S.C. §2113(d) (bank robbery with the use of a dangerous weapon or device) and 18 U.S.C. §924(c) (using, or unlawfully carrying a gun in the commisson of a federal felony); for it was to avoid "constitutional decisions where possible," 435 U.S. at 12, that the Court turned to a consideration of congressional intent. If the government is correct, the Court was seeking to avoid a constitutional issue that cannot possibly exist.

Similarly, if the government's analysis is valid, the plurality opinion in *Jeffers*, *supra*,—not to mention the dissent—becomes a hopeless muddle. Indeed, the Court of Appeals in *Jeffers* had read this Court's recent decision in *Iannelli* v. *United States*, 420 U.S. 770 (1975), as establishing "a new double jeopardy approach towards complex statutory crimes"; an approach which focused exclusively on congressional intent. 532 F.2d 1101, 1108 (1976). In other words, the Court of Appeals read *Iannelli* as establishing an approach which was, in fact, identical to that which the government now suggests be applied across the board. But the *Jeffers* plurality unequivocably rejected this interpretation of *Iannelli;* "contrary to the suggestion of the Court of Appeals, *Iannelli* created no exception to these general jeopardy principles for complex statutory crimes." *Id.* at 151. Plainly, the

"general jeopardy principles" referred to, relate to the Constitutional determination of "sameness", and are not synonymous with the determination of congressional intent. As the plurality said later in the course of its opinion, in addressing the cumulative punishment issue:

> If some possibility exists that the two statutory offenses are the "same offense" for double jeopardy purposes, however, it is necessary to examine the problem closely in order to avoid constitutional multiple punishment difficulties. *Id.* at 155.

But, as with *Simpson, supra*, if the government's position were correct, such constitutional difficulties could not conceivably exist with respect to the issue of multiple punishment.

That position has been consistently rejected by this Court. Its inadequacies are palpable. Indeed, the opinion of the lower court here vividly manifests its deficiencies and dangers. It should be unequivocably rejected again, and the petitioner's cumulative sentences set aside as violative of his rights under the Fifth Amendment.

II. The Court Of Appeals Impermissibly Sanctioned Double Punishment That Was Never Contemplated By Congress.

As we have shown in Part I of this Brief, the two offenses at issue are constitutionally "the same." But had the lower court properly analyzed the issue of

legislative intent, it would not even have had to reach the constitutional issue, for it would have found that Congress had not authorized double pubishment. *See, e.g., Simpson* v. *United States, supra*, where the Court was able to avoid decision on the constitutionality of double punishment under the congressional enactments involved there, when it found insufficient reason to believe that Congress intended consecutive sentencing. Instead the Court of Appeals seems to have conflated the statutory and constitutional issues, reasoning that because, in its view, separate societal interests were served by the rape and the felony murder statutes, cumulative punishment was permissible. It then seems to have used this conclusion to assume away the constitutional issue.

By doing so, the Court of Appeals elevated societal interest analysis to an unduly exalted position. But on its own terms, its analysis of the interests involved was deficient. The court found that when Congress prohibited rape and when it prohibited felony-murder, two distinct interests were at stake: protection against sexual assaults and protection of human life. 379 A.2d at 1159-60. Apparently as a variation on the same theme, the court stated that finding merger between felony-murder and the underlying felony would mean adopting a "construction of law the effect of which would be to render the underlying felony a nullity any time death occurred during its perpetration." 379 A.2d at 1160. This argument assumes what it sets out to prove. In addition, it loses sight of the

narrowness of the issue here, which is not the permissibility of cumulative punishment for a felony and a killing committed during its commission, but only such cumulative punishment where the homicide has been charged and proved as a felony-murder rather than some other form of criminal homicide.

In the first place, although the court was clearly correct that the felony-murder statute protects the societal interest in human life, it was wrong simply to assume that when felony-murder (rape) is charged, the felony-murder statute does not also implicate the societal interests served by the rape statute. For it is at least as plausible to believe, contrary to the view of the Court of Appeals, that the felony-murder rule is intended to embrace the interests protected by the underlying felony, just as it embraces all of the elements of that lesser offense, together with some further elements.[12] Indeed, felony-murder rule is usually

[12] Indeed, elsewhere in its opinion, the Court of Appeals expressly made this very point. It construed two precedents of its own, *Blango* v. *United States*, 373 A.2d 885 (D.C. Ct.App.1977) and *Harris* v. *United States*, 377 A.2d 34 (D.C. Ct. App. 1977), as permitting "separate convictions for first-degree premeditated murder and felony murder (burglary)," both based on the same killing. 379 A.2d at 1159. These separate homicide convictions were permissible, said the court in *Whalen*, because "the societal interests served by each statute [premeditated murder and felony murder] are separate and distinct." 379 A.2d at 1159, citing *Blango*, *supra*, 373 A.2d at 888. The *Whalen* court identified these separate interests by looking to the underlying felony:

> " '[T]he societal interest served by the burglary statute, protection of occupied dwellings, is separate and distinct from that of the murder statute, security and value of the person.' " 379 A.2d at 1159, *citing Harris*, *supra*, 377 A.2d at 38.

explained as doing precisely that. The rule is conceived of as providing additional deterrence with respect to the underlying felony and, as well, as creating an incentive for those who will commit the felony despite these added sanctions to do so with such care as to avoid even an accidental killing. *See, e.g.*, G. Fletcher, *Rethinking Criminal Law*, §4.45, at 298 (1978). And, although the legislative history of the 1940 enactment[13] that created the non-purposeful felony-murder provision here at issue is silent concerning the rationale that Congress accepted,[14] under the analysis of an influential contemporary explanation of homicide law, a felony-murder law would necessarily embrace the interests protected by the underlying felony. *See* Wechsler & Michael, *A Rationale of the Law of Homicide*, 37 Colum. L. Rev. 701 (1937). Wechsler and Michael argued that in cases when an unforeseeable killing occurs in the course of a felony—i.e., when the homicide may not be prosecutable except as felony-murder—the rule does not "make criminal any behavior that would not otherwise be criminal." *Id.*, at 745 n.161. In such a case, there is nothing to distinguish the felony-murder from the ordinary felony except the accidental consequences of identical

Thus, the Court of Appeals in *Whalen* read these two prior decisions as construing the felony-murder provision in issue here to serve the interests protected by the underlying felony.

[13] Act of June 12, 1940, Pub. L. No. 76-607, 54 Stat. 347.

[14] *See* S. Rep. No. 55 on S. 186, 76th Cong., 1st Sess. (1939); H.R. Rep. No. 28 on H.R. 1807, 76th Cong., 1st Sess. (1939).

conduct. The felony-murder rule then functions to permit harsher punishment for the felon who has caused a death, *Id.*, but, under this theory, that punishment would necessarily embrace punishment for the felonious conduct, as well as for the unintended consequence of that conduct, because the conduct punished as the felony and the conduct punished as felony-murder are the same.

Furthermore, acceptance of the petitioner's argument clearly does not result in "nullifying" the underlying felony whenever someone is killed in its commission. But when that killing is charged, proved, and punished as felony-murder, the felony-murder punishment can itself be fairly seen as embracing punishment for the underlying felony.[15] And, of course, the underlying felony is hardly ignored, for it serves to elevate to first degree murder, carrying a mandatory sentence of 20 years to life, a killing which, if judged by the killer's actual intent, might be merely second degree murder, manslaughter or even non-criminal homicide, none of which in the District of Columbia carries a mandatory sentence of even remotely comparable severity. *See, e.g., Goodall* v. *United States,*

[15] Petitioner did not challenge below, nor does he challenge here, the propriety of consecutive punishment for a felony and a killing committed during its perpetration, when the defendant has been proved guilty of homicide on some theory other than that of felony-murder. Petitioner here was indicted, in a separate count, with second degree murder, and convicted. Petitioner does not thallenge the propriety of consecutive sentences for rape and a separately charged second degree murder.

180 F.2d 397, 399 (D.C. Cir.), *cert. denied,* 339 U.S. 987 (1950). In addition, the felony-murder statute has been held to imply a rule of vicarious liability, so that any participant in the underlying felony may be convicted of first degree murder, even where he is otherwise wholly uninvolved in the killing. *See, e.g., United States* v. *Carter,* 445 F.2d 669, 672 & n.8 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 932 (1972). It is impossible to understand these rules, except as a form of aggravated punishment for the felony itself, when aggravating consequences occur.[16]

In petitioner's view, then, the Court of Appeals analysis of the interests served was too simplistic. But, at all events, that Court was mistaken in letting its conclusion with respect to congressional intent hinge exclusively on the outcome of this mode of analysis. For the purposes and and explanations of the felony-murder rule are myriad and complex. Analysis of it has shifted over the years. It is plainly too frail a reed to support the conclusion that Congress intended double punishment for for an offense and a necessarily included lesser offense.[17] At a minimum,

[16] On this view the felony-murder rule is justified because the commission of certain felonies is deemed inherently dangerous. If, then, a killing occurs in the course of the felony—even though the killing was completely unintended—all those participating in the felony may be deemed culpable with respect to the murder. But their culpability stems from their participation in the felony. *Cf.* R. Perkins, *Criminal Law,* 40-41 (2d ed. 1969).

[17] To be sure, the societal interest analysis employed by the Court of Appeals might be useful in solving other sorts of problems. It might be a useful mode of analysis for deciding whether

the double jeopardy clause requires a clear and convincing showing that the legislature intended double punishment before the courts may inflict such a presumptively impermissible penalty.[18] For if the court is

a single course of conduct violating the literal terms of two separate statutes can give rise to two separate convictions, when one offense is not necessarily included in the other. In such a situation, the Court of Appeals has looked to whether the defendant's actual conduct was such as to jeopardize independently, or just incidentally, the interests sought to be protected under each statute. *See Robinson* v. *United States*, 388 A.2d 1210, 1211-13 (D.C. Ct. App. 1978) (rape and kidnapping).

But, as petitioner shows in Part I of his brief, the outcome of such analysis is irrelevant when, as here, the two offenses are but one in the *Blockburger* sense. The Double Jeopardy Clause and the precedents of this Court interpreting it, prohibit double punishment, whatever societal interests the statutes might be deemed to serve. Moreover, as petitioner argues in Part II, the Court of Appeals' misplaced reliance on such analysis here led it to embrace a position that double punishment could be imposed in palpable conflict with the actual congressional intent.

[18] That the evidence that Congress intended cumulative punishment must be compelling is a corollary of the rule of lenity, which, at least when a potential double jeopardy violation exists, is itself grounded in the Constitution. *See Note*, Twice in Jeopardy, 75 Yale L.J. 262, 316 (1965):

> The rule of lenity is not a casual presumption about legislative intent, but a constitutionally compelled canon of construction. It requires the legislature to specify clearly when overlapping statutes are to allow cumulative sentences. It forbids courts to proliferate sentences out of legislative silence. The rule of lenity is designed to prevent multiple judicial punishment for a single legislative offense—to preclude substantive double jeopardy.

Cf. Simpson v. *United States*, 435 U.S. 6, 14-15 (1978); *Ladner* v. *United States*, 358 U.S. 169, 177-78 (1957); *Prince* v. *United States*, 352 U.S. 322, 329 (1957); *Bell* v. *United States*, 349 U.S. 81, 83 (1955).

wrong in its conclusion that consecutive punishment was intended, the defendant's double jeopardy rights are violated. Had the Court of Appeals looked to legislative history, it would have discovered that the evidence that might have supported a conclusion that Congress intended such double punishment simply does not exist. On the contrary, that history shows that Congress contemplated that there would not be successive punishment for felony-murder and the underlying felony.

The non-purposeful felony-murder provision under which petitioner was convicted was enacted in 1940 as an amendment to the original 1901 District of Columbia Code. *See* Act of June 12, 1940, Pub. L. No. 76-607, 54 Stat. 347. This amendment came in response to judicial decisions interpreting the other felony-murder provision in the first degree murder statute,[19] which punishes as first degree murder killings occurring in the course of "any offense punishable by imprisonment in the penitentiary." Those decisions had restricted the provision's application to purposeful killings. *See* S. Rep. No. 55 on S. 186, 76th Cong., 1st Sess. (1939); H.R. Rep. No. 28 on H.R. 1807, 76th Cong., 1st Sess. (1939). At the time of this enactment, however, a person convicted of first degree murder faced a mandatory death penalty. Act of March 3, 1901, ch. 854, §801, 31 Stat. 1321, *as amended by* Act

[19] *See Jordon* v. *United States*, 87 F.2d 64, 66 (D.C. Cir. 1936); *Marcus* v. *United States*, 86 F.2d 854, 859-60 (D.C. Cir. 1936).

of Jan. 30, 1925, ch. 115, §1, 43 Stat. 798. It is therefore clear that Congress envisaged no cumulative punishment for felony-murder and the underlying felony.

Nor is there any reason to think that when Congress enacted the statute that presently sets forth the penalty for first degree murder, it intended such cumulative punishment. In 1962, Congress repealed the mandatory death penalty provision for first degree murder and enacted a new provision that permitted imposition either of the death penalty or of life imprisonment. Act of March 22, 1962, Pub. L. No. 87-423, §1, 76 Stat. 46, *codified at* 22 D.C. Code §2404 (1973).[20] With respect to the life sentence thus authorized, Congress provided:

> Nothwithstanding any other provision of law, a person convicted of first degree murder and upon whom a sentence of life imprisonment is imposed shall be eligible for parole only after the expiration of twenty years from the date he commences to serve his sentence. *Id.*

Neither the House nor the Senate committee report on this legislation suggests that Congress intended to permit this mandatory sentence of from 20 years to life—by far the harshest sentence set forth anywhere

[20] The death penalty provisions have since been held to conflict with *Furman* v. *Georgia*, 408 U.S. 238 (1972), *see United States* v. *Stokes*, 365 A.2d 615, 616 n.4 (D.C. Ct. App. 1976), and as a result the punishment for first degree murder is a mandatory sentence of from twenty years to life.

in the District of Columbia Code—to run consecutively to the sentence for the underlying felony, when the conviction was for felony-murder. *See* S. Rep. No. 373 on S. 1380, 87th Cong., 1st Sess. (1961); H.R. Rep. No. 677 on H.R. 5143, 87th Cong., 1st Sess. (1961).[21]

Moreover, the extensive debate on this bill that occurred on the floor of the Senate makes clear that no one in the Senate[22] thought that this was a measure that would, for the first time, permit double punishment for felony-murder and the underlying felony. Just the opposite. The debate manifests a common assumption that the person convicted of felony-murder would be subject to the same penalty as the person convicted of premeditated murder, and to that

[21] Both reports state that the mandatory minimum sentence of 20 years for first degree murder was intended "to distinguish between the penalty for first degree murder and the penalty for second degree murder," for which a maximum sentence of from 15 years to life was authorized. S. Rep. No. 373, *supra*, at 2; H.R. Rep. No. 677, *supra*, at 2.

If Congress had intended to authorize consecutive punishment for felony-murder and the underlying felony, it would have been unnecessary to "distinguish" *such* first degree murders from second degree murders, even if the sentence for first degree murder were only from 15 years to life, because a conviction for felony-murder necessarily implies a conviction for the underlying felony. Thus, a convicted felony-murderer would always be subject to steeper penalties than a convicted second degree murderer, even if the sentences for the homicides themselves were identical.

[22] Comparatively little debate occurred on the House side, but nothing there indicates that one convicted of felony murder might be sentenced to a longer term than from 20 years to life. *See, e.g.*, 107 Cong. Rec. 12154 (1961) (remarks of Rep. Abernathy).

penalty only. Thus, Sen. Hartke, a sponsor of the legislation and, as chairman of the Committee on the District of Columbia, its chief spokesman on the floor, stated (108 Cong. Rec. 4128-29 (1962)):

> We must remember that the man who commits a felony, such as robbery or any other type of felony, and in the process of committing such felony also commits murder, kills an individual, or occasions his death, *is subject to the same provisons and penalties as if the act had been murder in the first instance.* [Emphasis supplied]

See also id. at 4131 ("The 20-year eligibility requirement affects all life sentences . . ."); *id.* at 4132 (". . . all persons sentenced to a life term shall serve 20 years of the term before being eligible for parole . . .").

There is, in fact, reason to think that Congress believed that persons convicted of felony-murder were less culpable, and thus deserving of less severe punishment than those found to have killed after actual premeditation.[23] Yet on the lower court's analysis, they are punished more harshly, for a sentence on the

[23] Sen. Keating, an active supporter of the bill, placed in the record a letter favoring the legislation, from David C. Acheson, the U.S. Attorney for the District of Columbia. That letter said (108 Cong. Rec. 3982 (1962)):

> A deliberate and premeditated poisoning . . . could plausibly call for a more severe punishment than a hasty felony murder such as the shooting of a gasoline station attendant in the course of a struggle by a first offender who was attempting to rob the establishment.

felony can be added to the 20 year to life felony-murder sentence.

The intended application of the new 20 year to life sentence is perhaps most clearly illustrated by the debate engendered by the proposed, but ultimately rejected amendment introduced by Sen. Morse. Under Morse's proposal, a third sentencing option would have been available following a first degree murder conviction. Instead of either death or life imprisonment, with parole eligibility after 20 years, the convicted murderer might be sentenced to life in prison without possibility of parole. This proposal sparked extensive debate. *Id.* at 4130-44. If anyone on the Senate floor had thought that a person convicted of felony-murder could be sentenced to a term of from 20 years to life, and then to a consecutive term on the underlying felony, surely this possibility would have been mentioned. For it would have shown that potential sentences under the original bill, at least for some felony-murders, were so substantial as to make Sen. Morse's proposal superfluous. To cite one pertinent example, the maximum allowable prison sentence for the crime of rape was, at the time, thirty years. *See* 22 D.C. Code §2801 (1961). Thus, if Congress had intended to allow cumulative punishment, a person convicted of felony-murder (rape) could be sentenced to a term of from 30 years to life, by any measure a substantially greater sentence than that for murder alone. *See* 24 D.C. Code §203(a) (1961). Yet no one made this point.

On the contrary, the Senate rejected Sen. Morse's proposal precisely because a 20 year term in prison was deemed long enough for a defendant convicted of a first degree murder to serve before becoming eligible for parole. Thus, Sen. Pastore remarked (108 Cong. Rec. at 4143):

> If he [the person convicted of first degree murder] is imprisoned for the rest of his life, under the law of the District of Columbia, after he shall have served 20 years, he can be considered for parole. That strikes me as being adequate.

Other senators, in endorsing the principle of parole eligibility after 20 years, warned that, at the time of sentencing, passions might run high. *Id.* at 4131 (remarks of Sen. Lausche); *id.* at 4135 (remarks of Sen. Keating). They therefore cautioned against tying the hands of the parole authority, when, after the passage of 20 years, events might be viewed differently, *see id.*, and when, at all events, new facts concerning the prisoner's health and his performance in prison might argue for parole. *See id.* at 4132-33 (remarks of Sen. Holland and Sen. Hartke); *id.* at 4134 (remarks of Sen. Holland). It seems inconceivable, then, that with such strong support in the Senate for the right to be considered for parole after 20 years, that body intended to authorize a punishment consecutive to the 20 year to life sentence for the felony murder for the underlying felony of which the defendant is necessarily also guilty.

Thus, while in petitioner's view it is dispositive that felony-murder and the underlying felony are the "same offense" under the *Blockburger* standard, the relevant legislative history merely buttresses the conclusion that consecutive punishment is impermissible. Although the petitioner would argue that the statutes here at issue should be construed with the rule of lenity in mind, and that no consecutive punishment should be allowed because there is no clear expression that this was Congress' intent, that result should obtain here even without applying that rule. For the legislative history here is not simply ambiguous. Rather, it affirmatively demonstrates that Congress intended no double punishment for felony-murder and the lesser included felony. Accordingly, the judgment of the Court below should be reversed.

CONCLUSION

The judgment of the District of Columbia Court of Appeals upholding consecutive sentences for felony-murder and the underlying felony should be reversed and the case remanded for resentencing.

Respectfully submitted,

/s/ SILAS J. WASSERSTROM
Silas J. Wasserstrom

/s/ WILLIAM J. MERTENS
William J. Mertens

/s/ W. GARY KOHLMAN
W. Gary Kohlman
Public Defender Service
451 Indiana Avenue, N.W.
Washington, D.C. 20001
628-1200
Counsel for Petitioner

No. 78-5471

In the Supreme Court of the United States

OCTOBER TERM, 1978

THOMAS W. WHALEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

ALLAN A. RYAN, JR.
Assistant to the Solicitor General

JEROME M. FEIT
ELLIOTT SCHULDER
Attorneys
Department of Justice
Washington, D.C. 20530

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 8-27; Pet. App. 1a-15a) is reported at 379 A.2d 1152.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1977. A petition for rehearing was denied on July 14, 1978 (A. 27; Pet. App. 16a). The petition for a writ of certiorari was filed on

September 25, 1978, and was granted on April 16, 1979.[1] The jurisdiction of this Court rests upon 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether the imposition of consecutive sentences for felony murder and for the underlying felony, in a single sentencing proceeding following a single trial, violates the Double Jeopardy Clause of the Fifth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

2. D.C. Code Ann. § 22-2401 (1973 ed.) provides in pertinent part:

> Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, * * * rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed

[1] The petition for certiorari was filed on behalf of both petitioner and James E. Pynes. The order granting certiorari was limited to petitioner's case.

> with or using a dangerous weapon, is guilty of murder in the first degree.

3. D.C. Code Ann. § 22-2404 (1973 ed.) provides in pertinent part:

> The punishment of murder in the first degree shall be death by electrocution unless the jury by unanimous vote recommends life imprisonment; or if the jury, having determined by unanimous vote the guilt of the defendant as charged, is unable to agree as to punishment it shall inform the court and the court shall thereupon have jurisdiction to impose and shall impose either a sentence of death by electrocution or life imprisonment.
>
> Notwithstanding any other provision of law, a person convicted of first degree murder and upon whom a sentence of life imprisonment is imposed shall be eligible for parole only after the expiration of twenty years from the date he commences to serve his sentence.

4. D.C. Code Ann. § 22-2801 (1973 ed.) provides in pertinent part:

> Whoever has carnal knowledge of a female forcibly and against her will * * * shall be imprisoned for any term of years or for life.

5. D.C. Code Ann. § 23-112 (1973 ed.) provides:

> A sentence imposed on a person for conviction of an offense shall, unless the court imposing such sentence expressly provides otherwise, run consecutively to any other sentence imposed on such person for conviction of an offense, whether or not the offense (1) arises out of another

transaction, or (2) arises out of the same transaction and requires proof of a fact which the other does not.

6. D.C. Code Ann. § 24-203 (1973 ed.) provides in pertinent part:

> (a) Except as provided in subsections (b) and (c), in imposing sentence on a person convicted in the District of Columbia of a felony, the justice or judge of the court imposing such sentence shall sentence the person for a maximum period not exceeding the maximum fixed by law, and for a minimum period not exceeding one-third of the maximum sentence imposed, and any person so convicted and sentenced may be released on parole as herein provided at any time after having served the minimum sentence. Where the maximum sentence imposed is life imprisonment, a minimum sentence shall be imposed which shall not exceed fifteen years' imprisonment * * *.

STATEMENT

In the District of Columbia, first degree murder is an offense that may be established in one of four ways. First, the prosecution may prove that the defendant purposely killed the victim with deliberate and premeditated malice. Second, it may prove that the defendant purposely killed by means of poison. Third, it may prove that the defendant purposely killed the victim in the course of committing (or attempting to commit) any felony. Fourth, the prosecution may prove that the defendant killed in the

course of committing (or attempting to commit) one of six specified major felonies, including rape. If the prosecution chooses the fourth means of proof, it need not prove that the homicide was purposeful. D.C. Code Ann. § 22-2401. First degree murder proven in either the third or fourth way is commonly known as "felony murder." Regardless of the method of proof, a conviction for first degree murder in the District of Columbia is punishable by imprisonment for a term of 20 years to life. D.C. Code Ann. § 22-2404.[2]

On September 10, 1972, between 10:30 a.m. and 12:30 p.m., Rebecca Rieser was raped and strangled in her room in the McLean Gardens apartment complex in Washington, D.C. (I Tr. 36, 52-58, 62-65; II Tr. 229). Petitioner, a maintenance worker at McLean Gardens, was indicted by a grand jury on seven counts of murder, rape, burglary, and robbery arising out of those events. He was tried by a jury in the Superior Court of the District of Columbia and was convicted on two counts of first degree murder (based on the felony murder provision of D.C. Code § 22-2401, with rape and burglary as the felonies); second degree murder, in violation of D.C. Code Ann. § 22-2403; rape, in violation of D.C. Code

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[2] The statute also provides for a sentence of death upon conviction for first degree murder, but that provision has been held unconstitutional. See *United States* v. *Stokes*, 365 A.2d 615, 616, n.4 (D.C. App. 1976); *United States* v. *Lee*, 489 F.2d 1242, 1247 (D.C. Cir. 1973).

Ann. § 22-2801; and burglary, in violation of D.C. Code Ann. § 22-1801(a).[3]

The trial court sentenced petitioner to concurrent terms of 20 years to life imprisonment on each first degree murder count and 15 years to life imprisonment on the second degree murder count. It also sentenced him to 15 years to life imprisonment for rape and 10 to 30 years imprisonment for burglary, the sentences to run consecutively to each other and to the sentences imposed on the murder counts (A. 5).

The District of Columbia Court of Appeals reversed the convictions for burglary and first degree murder based on the burglary on the ground that the indictment had been improperly amended (A. 9-12).[4] It affirmed the convictions and consecutive sentences for rape and first degree murder based on rape. In doing so, the court held that the offenses of rape and first degree (felony) murder do not merge so as to preclude separate convictions and consecutive sentences. The court concluded that the "societal interests which Congress sought to protect by enactment of D.C. Code 1973, § 22-2401 (felony murder) and § 22-2801 (rape) are separate and distinct. The rape statute is to protect women from sexual assault. The felony murder statute purports to protect human

[3] At the close of the government's case, the court entered a judgment of acquittal on the counts charging robbery and first degree (felony) murder based on the robbery (IV Tr. 586-587).

[4] The court of appeals denied the government's petition for rehearing on this issue (Pet App. 16a), and we have not sought further review of that ruling in this Court.

life—it dispenses with the need for the prosecution to establish that the accused killed with a particular state of mind, and instead permits the jury to infer the requisite intent from the fact that a felony was committed" (A. 15-16). In addition, the court held, "* * * while the underlying felony is an element of felony murder it serves a more important function as an intent-divining mechanism. Consistent with this view it is clear that rape is not a lesser included offense of felony murder, and that merger is inappropriate even absent societal interest analysis" (A. 17).

Having affirmed the conviction for felony murder, the court of appeals vacated the concurrent sentence for second degree murder, finding it to be a lesser included offense of felony murder (A. 14). The court refused, however, to reverse petitioner's conviction for second degree murder.

Thus, petitioner is now serving consecutive sentences of 15 years to life for rape and 20 years to life for murder. He does not challenge the validity of the convictions, but only the consecutive nature of the sentences. If the court of appeals' judgment is affirmed, petitioner will be eligible for parole after serving 35 years' imprisonment. If petitioner's position is sustained and the consecutive sentences are invalidated, he will be eligible for parole at least five years sooner.[5]

[5] Whether the minimum sentence in the event of reversal would be 20 or 30 years depends upon the way in which this Court disposes of the case. See note 48, *infra*.

SUMMARY OF ARGUMENT

The District of Columbia Court of Appeals held that the D.C. Code authorizes the imposition of consecutive sentences for first degree (felony) murder and for the rape that was charged and proved as the predicate felony. The court reasoned that even if rape is considered an "element" of the felony murder, the two offenses do not merge upon conviction because the two statutes were designed to protect separate societal interests, and the two offenses were sufficiently distinct. Petitioner challenges the constitutionality of his consecutive sentences under the Double Jeopardy Clause and, for the first time in his brief on the merits in this Court, asserts that the court of appeals misunderstood the congressional intent regarding the permissibility of such sentences.

I

Petitioner contends that in this case, because the prosecution had to prove the commission of the rape in order to obtain a conviction for first degree (felony) murder, the rape constituted a "lesser included" offense of felony murder and was accordingly the "same" offense for double jeopardy purposes. He further asserts that the Double Jeopardy Clause bars multiple punishments for the "same" offense, even in a single sentencing proceeding following a single trial, and even if the sentences conform to legislative authorization. We disagree with both contentions.

A. In the first place, rape and first degree (felony) murder are not the "same" offense for purposes of considering punishment under the Double Jeopardy Clause, because it is not ordinarily necessary to commit the former offense in order to commit the latter. Under *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), consecutive sentences are permissible for a violation of two separate statutory provisions if "each provision requires proof of a fact which the other does not." That test is met here, for rape requires proof of carnal knowledge while first degree murder requires proof of homicide. The fact that the prosecution here proved the commission of rape does not make rape a necessarily included offense of murder, since proof of the commission of any felony or of premeditation is sufficient to support a first degree murder conviction.

B. But even if first degree (felony) murder and rape are regarded as greater and lesser included offenses, or are for any other reason considered the "same" offense, double jeopardy principles do not bar separate, cumulative punishments for the "same" offense so long as such punishments have been authorized by the legislature. In this respect, there is a critical difference between the Double Jeopardy Clause's protection against successive trials and its protection against multiple punishments. While successive trials for the same offense are prohibited by the Double Jeopardy Clause as a constitutional policy of finality for the defendant's benefit, the protection against multiple punishments, in the con-

text of a single sentencing following a single trial, safeguards the defendant only from being punished more than the legislature intended.

Thus, the critical inquiry in the present case is not whether petitioner has been subjected to more than one punishment (indeed, legislatures commonly provide "multiple" punishments such as imprisonment and a fine for the same offense), but whether Congress intended that defendants convicted of felony murder and the underlying felony in the District of Columbia may be sentenced to consecutive terms for each crime. The Double Jeopardy Clause imposes no substantive restrictions on the legislature's power to prescribe punishment for crimes, and it is useless for petitioner to establish, as we assume he has done, that under the Double Jeopardy Clause his conviction for rape would have precluded a subsequent trial for first degree (felony) murder based on that rape. His task, rather, is to establish that the sentencing court here exceeded its legislative authorization, and this he has failed to do.

Petitioner relies on *Blockburger*, *supra*, and *Brown* v. *Ohio*, 432 U.S. 161 (1977), for the assertion—critical to his case—that consecutive sentences may never be imposed where two offenses are the "same" under *Blockburger*, *i.e.*, where one requires proof of no fact that the other does not. This Court has never struck down cumulative sentences on such a ground; more importantly, petitioner overlooks the fact that the *Blockburger* analysis was devised only as a means of discerning legislative intent. But legislative intent on the question of multiple punishment can be discerned in other ways as well, as this Court has recognized (see, *e.g.*, *Simpson* v. *United States*, 435 U.S. 6, 11-13 (1978); *Jeffers* v. *United States*, 432 U.S. 137 (1977) (plurality opinion)), and petitioner stands *Blockburger* on its head by arguing, in effect, that legislative intent, no matter how clearly expressed, should be ignored unless it conforms to the *Blockburger* test. It is one thing to hold, as *Blockburger* did, that the presence of distinct elements in two offenses demonstrates a legislative intent to allow consecutive punishments; it is quite another to use the distinct-offense test of *Blockburger*, as petitioner does, to thwart legislative intent.

C. Even if petitioner's theory regarding the existence of constitutional restrictions upon the legislature's power to authorize cumulative punishments were correct in the context of traditional greater and necessarily included lesser offenses (such as armed robbery and robbery, or first and second degree murder), it is inappropriate to reach the same conclusion with respect to the differently structured class of offenses in which there is a compound offense and a predicate offense. In addition to felony murder and the predicate felony, other examples of such "compound" offense/"predicate" offense situations include the prohibition against the use or unlawful carrying of a firearm during the commission of any other federal felony (18 U.S.C. 924(c)) and the proscription against conducting the affairs of an enterprise through a pattern of racketeering activity (18

U.S.C. 1962). We find it inconceivable that the Double Jeopardy Clause could properly be held to bar additional punishment for the use of a firearm in the commission of another crime even though the legislature has specifically prescribed such punishment. Yet that is the result to which petitioner's reasoning necessarily leads if it is correct, since the predicate felony under Section 924(c) is as much a "lesser included offense" of the firearms violation as rape is of felony murder.

Indeed, no "lesser included offense" rule can serve well in the felony murder context, because rape (or burglary or kidnapping) is never a truly included offense of murder; they are distinct acts, one committed independently of the other. That the legislature has allowed evidence of intent to commit the felony to serve as evidence of intent to commit the murder as well should not bar the imposition of consecutive sentences. The question, at bottom, should always be one of legislative intent, and the sentencing court must look to whether the legislature has provided for multiple punishments in cases such as these.

II

The District of Columbia Court of Appeals held in this case that Congress intended to allow consecutive punishment of first degree (felony) murder and rape. This Court should follow its traditional practice of not reviewing the construction given by the highest court of the District of Columbia to acts of Congress that are purely local in their application. *Pernell* v.

Southall Realty, 416 U.S. 363, 367 (1974). Furthermore, petitioner did not raise in his petition for a writ of certiorari the question whether the court of appeals' construction of local law was correct; he makes that argument for the first time in this litigation in his brief of the merits. For these reasons, this Court should not now undertake to review the conclusion of the court of appeals that local law permits separate punishments for the two crimes of which petitioner stands convicted.

If the Court does address that question, however, we believe it is clear that Congress did intend to allow cumulative punishment. The development of the felony murder doctrine at common law demonstrates that the underlying felony has never been considered a lesser included offense of murder, and Congress intended to apply that law in the District of Columbia. A contrary holding would mean that second degree murder would be subject to a more severe punishment, when combined with an associated felony, than first degree (felony) murder.

Furthermore, as the court of appeals held, the first degree (felony) murder statute and the rape statute were designed to protect entirely distinct societal interests, thus refuting petitioner's suggestion that the felony murder provision is merely a form of aggravated punishment for the felony when the defendant causes the victim's death in the course of committing the felony. Finally, by enacting D.C. Code Ann. § 23-112 in 1970, Congress expressly provided for cumulative punishment for separate convictions in circumstances such as these unless the

sentencing court specifies that the sentences are to be concurrent. These factors, considered together, demonstrate that the District of Columbia Court of Appeals was correct in its conclusion that the sentence imposed here did not exceed that authorized by Congress.

ARGUMENT

I

THE DOUBLE JEOPARDY CLAUSE DOES NOT BAR THE IMPOSITION, IN A SINGLE SENTENCING PROCEEDING FOLLOWING A SINGLE TRIAL, OF ANY COMBINATION OF PUNISHMENTS AUTHORIZED BY THE LEGISLATURE FOR THE OFFENSES OF WHICH THE DEFENDANT STANDS CONVICTED

A. Introduction

Both in petitioner's brief and in ours, frequent reference is made to the terms "same offense" and "greater and lesser included offenses." Care must be taken with the meaning of these terms. While they have been widely used in double jeopardy cases, in cases dealing with the statutorily authorized punishment for offenses, and in cases concerning the proper mode of instructing the jury regarding related offenses, they ordinarily are applied to offenses that stand in such a relationship to one another that it is impossible to commit one of the offenses without committing the other. In such a case, the subsidiary, or "lesser," offense is *necessarily* included within the greater. The present case, however, is one of a class involving statutes bearing a somewhat different relationship to each other, viz., in which the "included" offense is one of a class of offenses, any one of which

may be proved (and at least one of which must be proved) as part of the proof of the "greater" offense.[6] Whether this difference is of legal significance to the double jeopardy analysis is, of course, one of the important areas of disagreement between us and petitioner.

In this case, after the court of appeals had reversed petitioner's convictions on certain counts, he stood convicted and consecutively sentenced for rape and for first degree (felony) murder committed in the course of the rape. It is his contention that, because on the facts of the case the jury could not have arrived at a valid guilty verdict on the charge of murder without also finding that he had perpetrated or attempted to perpetrate the rape of the deceased, such rape was a "lesser included" offense of the murder. It is his further submission that the Double Jeopardy Clause bars the imposition of cumulative punishments for offenses standing in this relationship to one another, regardless whether the legislature intended to authorize such punishment.

We dispute both steps in petitioner's argument. We submit that, whatever may have been required to be proved in the particular circumstances of this case,

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[6] Rather than calling these "greater" and "lesser included" offenses, it is more accurate to call them "compound" and "predicate" offenses. In addition to cases like the instant one, involving felony murder and an underlying felony, the same issue is presented with statutes like 18 U.S.C. 924(c), prohibiting the use or unlawful carrying of a firearm during the commission of a federal felony, and 18 U.S.C. 1962(c), prohibiting the conduct of the affairs of an enterprise by a pattern of racketeering activity. See discussion at pages 48-49, *infra*.

rape and first degree (felony) murder are not the "same" offense for purposes of double jeopardy multiple punishment analysis, since it is not ordinarily necessary to commit the former offense in order to commit the latter. If that is so, petitioner's constitutional contentions fall of their own weight. But even if we are wrong in this submission, we contend that the Double Jeopardy Clause places no restrictions on the amount or number of punishments that may be imposed in a single sentencing following a single trial, save only that the punishments may not exceed those authorized under the circumstances by the legislature.

Here, the court of appeals determined that Congress intended to authorize the sentencing court to cumulate the statutory punishments specified for rape and for first degree (felony) murder for a defendant who has been convicted of killing in the course of a rape (the reviewability and correctness of that conclusion are addressed in Part II, *infra*). In effect, the court construed the punishment provisions of the pertinent sections of the District of Columbia Code as though they read as follows:

> For the commission of a premeditated homicide, the defendant shall be sentenced to a term of from 20 years' to life imprisonment. For the commission of any homicide, whether or not premeditated, in the course of a rape, the defendant shall be sentenced to a minimum term of from 20 to 35 years' imprisonment and a maximum term of life imprisonment.

We do not believe it can be seriously contended that a penalty provision drafted in the above language by Congress would raise a double jeopardy issue. See *Gore* v. *United States*, 357 U.S. 386, 391-392 (1958). The existing statutory scheme has been construed as being intended to reach the identical result. To hold the existing statutory scheme unconstitutional would thus be to trivialize the Double Jeopardy Clause and the very important policies that it serves. It would elevate form over substance and permit Congress to achieve a concededly legitimate result only if it does so by jumping through certain prescribed hoops.

That the Double Jeopardy Clause deals with substance and not form, and does not require Congress to go through any particular motions in fixing the appropriate penalty for criminal conduct, was underlined by this Court in *Gore* v. *United States*, *supra*. The Court was there faced with a statutory scheme that treated a single narcotics transaction as three separate offenses, each carrying a five year penalty. The defendant had been convicted of violating all three statutes at a single trial and had been given consecutive sentences. He claimed that these sentences violated the Double Jeopardy Clause. The Court rejected the claim. It pointed out that Congress could have passed a single statute making it a crime, punishable by 15 years' imprisonment, to commit acts that would have violated all three of the existing statutes. This being the case, the Court concluded that the only issue was whether the Congress had intended that the five year sentences be cumulative. Concluding that it had, the Court rejected the double jeopardy claim.

B. Rape And First Degree (Felony) Murder Are Not The "Same" Offense For Double Jeopardy Purposes

The evidence showed that petitioner, in what must have been one brief and violent episode, raped and murdered Rebecca Rieser. In the District of Columbia, rape is punishable by imprisonment for any term of years or for life, D.C. Code Ann. § 22-2801, and petitioner was convicted and sentenced to a term of 15 years to life imprisonment for that crime. As noted above (see pages 4-5, *supra*), murder in the first degree includes a purposeful killing in the course of any felony or any killing of another person while perpetrating or attempting to perpetrate one of six specified major felonies, including rape. D.C. Code Ann. § 22-2401. Petitioner was convicted of first degree (felony) murder as well as rape, and his sentence of 20 years to life imprisonment (see D.C. Code Ann. § 22-2404) was made to run consecutively to the rape sentence.

Had petitioner been convicted of first degree murder through proof that he killed with "deliberate and premeditated malice," rather than through proof that he killed while committing another felony, he would not have even a colorable claim that his consecutive sentences for the two offenses violate the Double Jeopardy Clause. Murder and rape are utterly distinct offenses by any measure, and it could hardly be suggested that, if the government's evidence proved that a defendant had raped his victim, and also murdered her "purposely * * * of deliberate and premeditated malice," the defendant could not, consistent with the Double Jeopardy Clause, be sentenced

consecutively for each crime.[7] Petitioner recognizes this truth. Br. 30 n.15.

Petitioner's claim in this case depends on the fact that, at his trial, the government proved the first degree component of the murder—as it incontestably was entitled to do—by proving that the homicide was committed in the course of rape. Under this "felony murder" theory, the government was not required to prove that the killing was done "purposely * * * of deliberate and premeditated malice." D.C. Code Ann. § 22-2401.[8] As the court of appeals stated, "[t]he felony murder statute * * * dispenses with the need for the prosecution to establish that the accused killed with a particular state of mind, and instead permits the jury to infer the requisite intent from the fact that a felony was committed" (A. 15-16).[9] The essence of petitioner's claim is that, in these circumstances, rape

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[7] Petitioner was not charged with first degree murder in this fashion; he was charged with three counts of first degree murder, based on the predicate felonies of rape, burglary and robbery (on the last count the court entered a judgment of acquittal at the close of the government's case, see note 3, *supra*) and one count of second degree murder (A. 1-2).

[8] In order to convict petitioner of second degree murder, on the other hand, the government did have to prove that petitioner killed with a particular state of mind, *i.e.*, malice aforethought. D.C. Code Ann. § 22-2403. Petitioner concedes (Br. 30 n.15) that he may be sentenced consecutively for rape and second degree murder.

[9] As we show below (see pages 63-64, *infra*), this theory of transferred intent embodied in Section 2401 has its origins in the common law notion of "implied malice" that developed as part of the felony murder doctrine.

is a lesser included offense of first degree (felony) murder, and thus the two offenses "are, for double jeopardy purposes, 'the same' offense for which only one punishment can be imposed * * *; therefore cumulative punishment for felony-murder (rape) and the underlying rape constitutes impermissible double punishment for the same rape offense" (Br. 8).

Petitioner contends only that the Double Jeopardy Clause prohibits multiple punishments for the "same" offense. Thus, the threshold question is whether rape and first degree (felony) murder, as defined in the District of Columbia Code, are the "same" or "different" offenses for double jeopardy purposes. For present purposes, we assume that the court below correctly concluded that Congress meant to punish these two offenses separately; indeed, petitioner did not contend otherwise in the court of appeals, nor did he challenge this conclusion in his petition for certiorari (see pages 58-60, *infra*). If the two offenses are not the "same," it is clear that, as a constitutional matter, they may be punished consecutively, since the Double Jeopardy Clause does not even arguably forbid two punishments for different offenses. *Gore* v. *United States*, *supra*, 357 U.S. at 392-393.

The test announced in *Blockburger* v. *United States*, 284 U.S. 299 (1932), provides a relatively simple, albeit mechanistic, means of determining whether two offenses are the "same." In *Blockburger*, the defendant made two separate sales of narcotics. He was tried, convicted, and consecutively sentenced on two counts relating to each sale: first, that he had

sold drugs not in the original package (an offense under one statute), and second, that he had sold drugs not pursuant to written order of the purchaser (an offense under another statute). In this Court, he contended that he could be punished only once for each sale, simply because there had been only one sale on each occasion. The Court disagreed (*id.* at 304):

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

The Court determined that the original-package offense and the written-order offense met this test, for each required proof of an element that the other did not. *Ibid.*

Thus, the *Blockburger* test was devised as a method of determining whether Congress had created one crime or two, and thus whether a defendant could be sentenced to one jail term or two. "The test articulated in *Blockburger* serves the function of identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction." *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975). The Court decided that, in the absence of other evidence, the congressional intent could be determined by inquiring whether each crime required proof of an element that the other did not. If so, the offenses were not the same; otherwise, they were.

Although the decision in *Blockburger* addressed a problem of statutory construction and not of consti-

tutional doctrine (Blockburger raised no double jeopardy claim, and the Court did not decide any), the test itself was clearly derived from this Court's earlier double jeopardy decisions. See 284 U.S. at 304 (citing *Gavieres* v. *United States*, 220 U.S. 338, 342 (1911), and *Albrecht* v. *United States*, 273 U.S. 1, 11-12 (1927)). The *Blockburger* test and its antecedents have been employed "to determine whether a single transaction may give rise to separate prosecutions, convictions, and/or punishments under separate statutes." *Sanabria* v. *United States*, 437 U.S. 54, 70 n.24 (1978). As we explain below, however (see pages 43-44, *infra*), this Court has never held that the *Blockburger* test is the only standard for determining whether multiple sentences are constitutionally permissible. In any event, we now demonstrate that, under the *Blockburger* test, the District of Columbia rape and first degree (felony) murder statutes at issue here create different offenses that may be punished separately without offending the Double Jeopardy Clause.

The *Blockburger* or "distinct elements" test (see Note, *Twice in Jeopardy*, 75 Yale L.J. 262, 273 (1965)) emphasizes the elements of the two crimes as they are set forth in the statutes; indeed, the word "provision" was specifically used by the Court in setting forth the test (see page 20, *supra*). "If each [offense] requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes * * *." *Brown* v. *Ohio*, 432 U.S. 161, 166 (1977), quoting from *Iannelli* v. *United States*,

supra, 420 U.S. at 785 n.17. This Court has consistently applied the test in this manner.

For example, in *Albrecht* v. *United States*, *supra*, the defendant was sentenced consecutively for illegal possession and sale of liquor. He contended that, since the same liquor was involved in the possession and the sale count, he was being doubly punished in violation of the Double Jeopardy Clause. But because it is *theoretically* possible for one to possess without selling on the one hand, and to cause delivery of contraband which he has never possessed, on the other hand, the Court concluded that the two offenses are distinct, notwithstanding the fact that the evidence adduced at trial showed that the defendant had in fact sold the same liquor that he had possessed. Similarly, in *Harris* v. *United States*, 359 U.S. 19 (1959), the defendant claimed that he could not be cumulatively sentenced for buying narcotics except in or from the original stamped package and for receiving and concealing unlawfully imported narcotics, since in order to convict him of both offenses, the prosecution had to prove only one act of possessing the same narcotics, while the remaining elements of each offense were supplied by statutory presumptions. But because "the *violation*, as distinguished from the direct evidence offered to prove that violation, was distinctly different under each of the respective statutes," the Court held that the consecutive sentences were permissible. 359 U.S. at 23 (emphasis in original).[10]

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[10] The same argument was rejected in *Iannelli* v. *United States*, *supra*, where the Court concluded that conspiracy

Petitioner argues (Br. 16-18 & n.6) that the *Blockburger* test makes sense only when applied to the specific allegations in the indictment, rather than to the statutory elements of the offenses.[11] This argument ignores the language of the test and the manner in which this Court has consistently applied it. It makes little sense, moreover, to say that two statutory offenses that were intended by the legislature to be punished consecutively may only be so punished if the indictment is drawn by the prosecutor in a certain way. While petitioner's approach may be helpful in the successive prosecution context, see *Sanabria* v. *United States*, *supra*, 437 U.S. at 65-66, it is unsuitable for purposes of determining the propriety of consecutive sentences because it elevates the form of a particular indictment—which may contain superfluous allegations—over the substance

(18 U.S.C. 371) and conducting an illegal gambling business involving five or more persons (18 U.S.C. 1955) were not the "same" offense under the *Blockburger* test despite the fact that the gambling offense in that case was operated conspiratorially. Although as a practical matter the group involved in the gambling business will almost always act in concert, it is at least possible that the five persons "involved" in the operation might not be in criminal concert. See 420 U.S. at 785 n.17; see also *Jeffers* v. *United States*, 432 U.S. 137, 148 n.13 (1977) (plurality opinion).

[11] Petitioner also argues (Br. 17-18) that under our analysis, assault with intent to kill as defined in the District of Columbia Code (D.C. Code Ann. § 22-501) is not a lesser included offense of first degree murder because it is possible to commit the latter offense without committing the former by poisoning the victim. Petitioner overlooks the fact that administration of poison is proscribed along with other forms of assault in section 501.

of the crimes as defined by the legislature. As we show below (see pages 30-37, *infra*), these two aspects of double jeopardy implicate different interests.

Applying the *Blockburger* test to the offenses for which petitioner was convicted and consecutively sentenced, it is clear that they are different and thus separately punishable under the Double Jeopardy Clause. The District of Columbia rape statute (D.C. Code Ann. § 22-2801) requires proof of carnal knowledge, while the applicable felony murder provision of the first degree murder statute (D.C. Code Ann. § 22-2401) does not. Likewise, in order to convict for felony murder the prosecution must show that the defendant killed his victim, whereas a killing need not be proved to convict for rape. Satisfaction of the *Blockburger* test thus demonstrates that Congress defined separate crimes that may be cumulatively punished.

Petitioner contends (Br. 13), however, that because the jury could not convict him of first degree (felony) murder unless it found that he had committed the underlying felony, here rape, the rape was a lesser included offense of first degree (felony) murder. Petitioner further contends that since greater and lesser included offenses are considered the "same" offense for double jeopardy purposes, he may not be punished separately for rape and first degree (felony) murder. Petitioner's conclusion falls with his premise, since the underlying offenses are not lesser included offenses of felony murder.[12]

[12] And his conclusion is wrong even if the premise is correct. See pages 30-53, *infra*.

A greater offense will invariably require proof of every fact necessary to show the lesser included offense as well as proof of one or more additional elements. See *Jeffers* v. *United States*, 432 U.S. 137, 150 (1977) (plurality opinion); *Brown* v. *Ohio*, *supra*, 432 U.S. at 167-168. Under D.C. Code Ann. § 22-2401, however, neither rape nor any of the other enumerated felonies is a *necessarily* included offense of felony murder, since proof of the commission of *any* of those enumerated felonies is sufficient to support a felony murder conviction. Put another way, the statute does not require that rape need always be proven in order to secure a conviction for murder committed in the course of a felony. See *Ennis* v. *State*, 364 S.2d 497, 499 (Fla. App. 1978); cf. *Vanetzian* v. *Hall*, 562 F.2d 88, 89-90 & n.2 (1st Cir. 1977).

None of this Court's decisions relied upon by petitioner supports his argument that rape and first degree (felony) murder are the "same" offense. In *Brown* v. *Ohio*, *supra*, this Court held that, once the defendant had been convicted and punished for the offense of "joyriding"—taking or operating an automobile without the owner's consent—he could not thereafter be tried for theft of the auto. The Court noted that joyriding was, under Ohio law, a lesser included offense of auto theft. 432 U.S. at 163-164, 167. Because each [offense did not] require "proof of a fact that the other does not * * *," *Brown* v. *Ohio*, *supra*, 432 U.S. at 166, quoting *Blockburger* v. *United States*, *supra*, 284 U.S. at 304, the offenses were the "same." The Court thus held that the trial court had erred in overruling Brown's objection that

the Double Jeopardy Clause barred a trial for the auto theft following his trial and conviction for joyriding. See 432 U.S. at 163-164.

Here, in contrast to *Brown*, the court of appeals, in construing the provisions of the District of Columbia Code, has concluded that rape is not a lesser included offense of first degree (felony) murder. Moreover, unlike the situation under the applicable Ohio statutes, which made it impossible to commit auto theft without also committing joyriding because one cannot steal a car unless one takes it without the owner's consent, one can certainly rape without killing or kill without raping. Even when one does both, as petitioner did, he performs two separate acts; first he rapes, then he kills.

In *Jeffers* v. *United States*, 432 U.S. 137 (1977), the plurality assumed, without deciding, that the "in concert" language of 21 U.S.C. 848 requires proof of an agreement among the persons involved in the continuing enterprise. 432 U.S. at 149-150. Based on that assumption, the plurality concluded that the offense of conspiracy defined in 21 U.S.C. 846 was a lesser included offense within Section 848, and that the two offenses were the "same" for double jeopardy purposes. 432 U.S. at 150-151; see also *id.* at 158 (opinion of Stevens, J.). If the term "in concert" refers to an agreement, then, like the situation in *Brown* and unlike that here, it is impossible to violate the continuing criminal enterprise statute without at the same time committing the offense of conspiracy.[18]

[18] Petitioner contends (Br. 21; emphasis in original) that under the approach we urge, the plurality in *Jeffers* would

While *Harris* v. *Oklahoma*, 433 U.S. 682 (1977), is somewhat more pertinent, it too does not confirm petitioner's view of the *Blockburger* test. Harris was convicted of felony murder arising out of an armed robbery. He was then charged, in a second prosecution, with the armed robbery. Prior to trial he moved to dismiss the information, asserting that under the Double Jeopardy Clause his earlier conviction barred any subsequent trial for armed robbery. *Harris* v. *State*, 555 P.2d 76, 78 (Okl. Crim. App. 1976). This motion was denied, and petitioner was tried, convicted, and sentenced to 30 years' imprisonment. *Id.* at 77. This Court reversed in a per curiam opinion. It held that "[w]hen, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one." 433 U.S. at 682.

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have concluded that Section 846 does not define a lesser offense of Section 848, "because, as with felony murder, any one of a range of predicate offenses *could have been* charged to establish the § 848 violation. These offenses *could have been* different from those the defendant was alleged to have conspired to commit under § 846." But it is clear from the structure of the statute that the "in concert" language of Section 848 refers not to the predicate offense which the defendant must be shown to have committed under subdivision (b)(1), but to the continuing series of violations which must be shown under subdivision (b)(2). Thus, regardless of which particular crime serves as a predicate offense, the government must still always establish, as a separate statutory requirement, a pattern of violations committed "in concert" with other members of the enterprise. Accordingly, while no particular substantive offense would be necessarily included within the continuing enterprise offense defined in Section 848, the conspiracy offense would be.

But the Court did not expressly hold that robbery and murder were the "same" offense under the *Blockburger* test; indeed, the brief opinion in *Harris* does not even cite the *Blockburger* decision. Instead, the Court relied primarily on *In re Nielsen*, 131 U.S. 176 (1889), which, like all of the other cases cited in *Harris*, involved multiple prosecutions.[14]

In *Nielsen* the Court held that a conviction for cohabitation with two wives over a two and one-half year period barred a later prosecution for adultery with one of the wives on the day following the end of that period. As this Court recently observed in *Brown* v. *Ohio*, *supra*, the adultery and cohabitation charges in *Nielsen* each required proof of an element which the other did not; nonetheless, the Court in *Nielsen* "held the separate offenses to be the 'same' for purposes of protecting the accused from having to 'run the gantlet' a second time." *Brown* v. *Ohio*, *supra*, 432 U.S. at 167 n.6.[15] Thus,

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[14] What *Harris* does establish is that, had petitioner been previously convicted or acquitted of the felony murder, he could not thereafter have been tried for the rape that formed the predicate for the murder conviction.

[15] The Court in *Nielsen* (131 U.S. at 190) cited with approval the decision of the New Jersey Supreme Court in *State* v. *Cooper*, 13 N.J.L. 361 (1833), which held that a conviction for arson barred a subsequent indictment for felony murder based on the death of a man killed in the fire. *Cooper* lends no support to petitioner, however, since that successive prosecution decision has uniformly been viewed as applying the "same transaction" test. See Note, *Statutory Multiple Punishment and Multiple Prosecution Protection*, 50 Minn. L. Rev. 1102, 1106 n.24 (1966); Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 Iowa L. Rev. 317,

Harris v. *Oklahoma*, like *Nielsen*, may simply be illustrative of the general rule that "[e]ven if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first." *Brown* v. *Ohio*, *supra*, 432 U.S. at 166-167 n.6.

A good deal of the difficulty in petitioner's argument is due to the fact that he has attempted to apply principles developed in the context of deciding whether successive trials are permissible to a case that involves the imposition of consecutive sentences in a single sentencing proceeding following a single trial. As we now show, even if first degree (felony) murder and rape are regarded as greater and lesser included offenses, or are for any other reason considered the "same" offense, double jeopardy principles do not bar separate, cumulative punishments for the "same" offense so long as such punishments have been authorized by the legislature.

C. The Double Jeopardy Clause Forbids Imposition Only of a "Multiple" Punishment That the Legislature Has Not Authorized

1. *The Protection Against Successive Trials and the Protection Against Multiple Punishments are Distinct*

There is a critical difference between the Double Jeopardy Clause's protection against multiple pun-

325 n.32 (1954); Note, 7 Brooklyn L. Rev. 79, 83 n.43 (1937). The "same transaction" test has never been accepted by this Court in the double jeopardy context. See, *e.g.*, *Thompson* v. *Oklahoma*, 429 U.S. 1053 (1977) (Brennan, J., dissenting).

ishment and its protection against successive prosecutions following conviction or acquittal. The latter protection needs no further reference to define it: once the defendant is acquitted or convicted of an offense, "the State with all its resources and power [is not] allowed to make repeated attempts to convict" him of that offense. *Green* v. *United States*, 355 U.S. 184, 187 (1957). See also *Benton* v. *Maryland*, 395 U.S. 784, 194 (1969); *Ashe* v. *Swenson*, 397 U.S. 436, 446-447 (1970).[16] The prohibition against multiple punishment, however, can be defined only by reference to the punishment that the legislature[17] has authorized for the offenses, because "[t]he punishment appropriate for the diverse federal offenses is a matter for the discretion of Congress * * *." *Bell* v. *United States*, 349 U.S. 81, 82 (1955). See *Prince* v. *United States*, 352 U.S. 322 (1957); *Dorszynski* v. *United States*, 418 U.S. 424, 431 (1974). As this Court stated in *Brown* v. *Ohio*, *supra*, 432 U.S. at 165: "Where consecutive sentences are imposed at a single criminal trial, the role of the

[16] There are, of course, exceptions to this rule. For example, there is no constitutional bar to retrial of a convicted defendant who wins reversal of his conviction on appeal, *United States* v. *Ball*, 163 U.S. 662 (1896); *Price* v. *Georgia*, 398 U.S. 323 (1970), or has it set aside on collateral attack, *United States* v. *Tateo*, 377 U.S. 463 (1964).

[17] The double jeopardy prohibition of the Fifth Amendment is applicable to the states through the Fourteenth Amendment, *Benton* v. *Maryland*, *supra*, 395 U.S. at 794, and "the same constitutional standards apply against both the State and Federal Governments." *Id.* at 795. Hence, in this brief we use the terms "legislature" and "Congress" interchangeably.

constitutional guarantee [against double jeopardy] is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense."

Furthermore, the protection against successive prosecutions is designed to prevent the government from "subjecting [the defendant] to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States*, *supra*, 355 U.S. at 187-188; *Benton* v. *Maryland*, *supra*, 395 U.S. at 796. Stated somewhat differently, the successive-prosecution protection "serves 'a constitutional policy of finality for the defendant's benefit.'" *Brown* v. *Ohio*, *supra*, 432 U.S. at 165, quoting *United States* v. *Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion). Thus, for example, the protection against successive prosecutions protects against a retrial for murder when the first trial for murder results in a conviction only of manslaughter. *Price* v. *Georgia*, 398 U.S. 323 (1970). In this inquiry, the fact that the second trial resulted in a punishment no greater than that imposed after the first trial is irrelevant, because the protection "is cast in terms of the risk or hazard of *trial* and conviction, not of the ultimate legal consequences of the verdict." *Id.* at 331 (emphasis added); see *Jeffers* v. *United States*, *supra*, 432 U.S. at 151 n.18 (plurality opinion).

These concerns are superfluous when it comes to construing the scope of protection offered by the

guarantee against multiple punishment. A defendant who is cumulatively punished, whether legally or illegally, in a single sentencing proceeding following a single trial, suffers no continuing expense, ordeal or anxiety, nor are his chances of being convicted although innocent enhanced. His trial is "final." The protection against multiple punishments is dormant until the trial is over and sentencing begins.

Finally, successive prosecution for the same offense is, by itself, unconstitutional. No legislature could constitutionally enact a law providing that a defendant tried and convicted of an offense could thereafter be tried again and convicted of the same offense.

But the inquiry into the multiple-punishment protection is not so simple.[18] The fact is that the legislature can and frequently does authorize two punishments for the same crime. It may, in fact, provide as many different penalties for a given crime as it thinks

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[18] It is of course true that where the Double Jeopardy Clause bars a second trial, a fortiori it bars any punishment imposed as a result of that trial. Thus, when this Court has held that a subsequent trial that in fact has taken place should not have taken place under the Clause, it holds the punishment, no less than the trial, unconstitutional. See, *e.g.*, *Brown* v. *Ohio*, *supra*, 432 U.S. at 162. In such cases, however, the Court has had no need to examine, and has not examined, the distinctions between the two protections. In some cases it has not even mentioned what the second punishment was. *E.g.*, *Harris* v. *Oklahoma*, *supra*. Because the second sentence is the consequence of an unconstitutional trial, there is no need to subject it to multiple-punishment analysis. Indeed, any such analysis would be pointless, for no matter what the outcome, the sentence would still be invalid because the trial was prohibited.

appropriate. Most offenses are punishable by both fine and imprisonment. Others have additional punishments prescribed as well. See, *e.g.*, 21 U.S.C. 848 (conviction of participating in a continuing criminal enterprise subject to punishment by imprisonment, by a fine, and by forfeiture of profits and interest in the enterprise); 21 U.S.C. 841(b) (conviction of manufacture or distribution of drugs subject to punishment by imprisonment, a fine, and a special parole term in addition to any imprisonment imposed). A general court-martial, for example, may in appropriate cases impose a punishment in four forms—confinement at hard labor, reduction in rank, forfeiture of pay, and a dishonorable discharge. 10 U.S.C. 818, 857, 858, 858a; *Manual for Courts-Martial* ¶¶ 126-127 (1951 & Cum. Supp. 1959); *Trop* v. *Dulles*, 356 U.S. 86 (1958).

The subject of multiple punishment was first discussed in constitutional terms in *Ex Parte Lange*, 85 U.S. (18 Wall.) 163 (1873). In that case, the trial court erroneously imposed a sentence of imprisonment *and* a fine when the authorized sentence was imprisonment *or* a fine. Lange paid the fine, and the trial judge then recalled him and "corrected" the sentence to provide only for imprisonment. This Court held that once Lange had paid the fine (which, having been paid into the Treasury, could not be refunded) he had suffered punishment as the statute provided, and the trial court could not thereafter resentence him without subjecting him to impermissible double punishment:

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And * * * there has never been any doubt of [this rule's] entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.

Ex Parte Lange, supra, 85 U.S. (18 Wall.) at 168, quoted in *North Carolina* v. *Pearce*, 395 U.S. 711, 717-718 (1969).

The imposition of both a fine and imprisonment in *Ex Parte Lange* was a multiple punishment prohibited by the Double Jeopardy Clause simply because Congress had not authorized both; it had authorized only one or the other. When the legislature has authorized both a fine and imprisonment as punishment, no one has ever seriously suggested that a court that imposes both violates the Double Jeopardy Clause. True, the punishment is "multiple" in the literal sense that it takes more than one form, but it is not "multiple" in the constitutional sense because the defendant is subjected only once to the punishment that the legislature has authorized; the fact that it may take two—or more—forms is irrelevant for double jeopardy purposes.[19]

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[19] It is not entirely clear why the *Lange* Court chose to rest its decision on double jeopardy grounds, since the same result was compelled by the statute under which Lange was convicted, wholly without regard to the existence of the constitutional double jeopardy protection. Moreover, it would seem indisputable that the Due Process Clause would preclude the imposition of a sentence depriving a defendant of either liberty or property in a manner or to an extent not authorized by legislative enactment.

This principle is most strikingly illustrated by comparing *Ex Parte Lange* with *Bozza* v. *United States*, 330 U.S. 160 (1947), a case that is the converse of *Lange*. In *Bozza*, the defendant was convicted of a crime for which Congress had prescribed a mandatory punishment of imprisonment and a $100 fine. The judge sentenced Bozza to imprisonment but made no mention of a fine. Shortly afterwards, the judge recalled Bozza and sentenced him again, this time both to imprisonment and the $100 fine. Because the second sentence imposed a "valid punishment for an offense instead of an invalid punishment for that offense" (*id.* at 167), this Court rejected Bozza's contention that he had been twice punished in violation of the Double Jeopardy Clause. The Court distinguished *Lange* on the ground that Bozza, unlike Lange, "had not suffered any lawful punishment until the court had announced the full mandatory sentence of imprisonment *and* fine." *Id.* at 167 n.2 (emphasis in original). Bozza thus was punished not only in two forms—imprisonment and a fine—he was sentenced twice, first invalidly and later validly. But neither the double punishment nor the multiple sentencing violated the Double Jeopardy Clause, because he was sentenced only to what Congress had required.[20] See also *United States ex rel. Ferrari* v.

[20] A different case may well have been presented had Congress authorized imprisonment, or a fine, or both. The first sentence would then have been valid, and it is possible that the court could not have recalled Bozza to add the fine to his sentence. See *Borum* v. *United States*, 409 F.2d 433 (D.C. Cir. 1967), cert. denied, 395 U.S. 916 (1969). This concern does not implicate the multiple punishment protection as

Henderson, 474 F.2d 510, 513 (2d Cir.), cert. denied, 414 U.S. 843 (1973).

In short, while one may answer the question whether a defendant has been successively prosecuted in violation of the Double Jeopardy Clause by determining whether his second trial follows a previous acquittal or conviction for the same offense, one may not conclusively determine the question of multiple punishment simply by ascertaining the punishment to which he has been subjected. One must compare the defendant's sentence with the sentence that the legislature has authorized for the crime. "In every instance the problem is to ascertain what the legislature intended." *Gore* v. *United States*, 357 U.S. 386, 394 (1958) (Warren, C.J., dissenting). See *Dorszynski* v. *United States*, 418 U.S. 431 (1974).

2. *The Double Jeopardy Clause Does Not Limit the Power of the Legislature to Fix Punishment*

It is important to recognize not only that the protection against multiple punishments is to be determined by reference to what the legislature has provided, but also that the Double Jeopardy Clause places no restrictions on the power of the legislature to define crimes and to ordain their punishment.[21]

such, for the defendant could validly have been sentenced at the outset to both forms of punishment; the question it raises has to do with whether a court can vacate a valid sentence and impose a harsher one. Cf. *North Carolina* v. *Pearce*, *supra*; *United States* v. *Di Francesco*, No. 78-1250 (2d Cir. Aug. 6, 1979).

[21] Other provisions of the Constitution circumscribe this power to some extent. As to the power to define offenses, for example, the Due Process Clause of the Fourteenth Amend-

Brown v. *Ohio*, *supra*, 432 U.S. at 165; *Sanabria* v. *United States*, 437 U.S. 54, 69 (1978). Under our constitutional system, that is the legislature's duty. *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); *Ex Parte United States*, 242 U.S. 27, 42 (1916). Thus, the legislature, by prescribing the "allowable unit of prosecution," *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952), free of any restraints imposed by the Double Jeopardy Clause, may "punish[] separately each step leading to the consummation of a transaction * * *

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ment prohibits a legislature from making abortion during the first trimester of pregnancy a crime, *Roe* v. *Wade*, 410 U.S. 113, 164 (1973); the Due Process Clause and the Equal Protection Clause each prohibit the legislature from making miscegenation a crime, *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967); and the First Amendment forbids the legislature from making it a crime to possess obscene material in one's home, *Stanley* v. *Georgia*, 394 U.S. 557, 568 (1969), or for a newspaper to publish the name of a youth charged as a juvenile offender, *Smith* v. *Daily Mail Publishing Co.*, No. 78-482 (June 26, 1979), slip op. 8.

As to punishment, the Eighth Amendment precludes punishment for being a drug addict, *Robinson* v. *California*, 370 U.S. 660, 666-667 (1962), and prohibits a legislature from prescribing the death penalty for rape, at least in the absence of excessive brutality or serious injury. *Coker* v. *Georgia*, 433 U.S. 584 (1977); *id.* at 601-604 (Powell, J., concurring and dissenting). See *Lockett* v. *Ohio*, 438 U.S. 586 (1978), and cases there discussed, and cases cited in *Ingraham* v. *Wright*, 430 U.S. 651, 667 (1977). And the Ex Post Facto Clause prohibits the legislature from increasing the punishment after the crime has been committed. *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798); *Bouie* v. *City of Columbia*, 378 U.S. 347, 353 (1964). Those decisions are of no help to petitioner here, and he does not rely on them.

and punish[] also the completed transaction." *Albrecht* v. *United States*, 273 U.S. 1, 11 (1927). The legislature can make criminal, and authorize cumulative punishment for, discrete acts that are part of a single course of action, *e.g.*, *Blockburger* v. *United States*, *supra* (consecutive prison terms permissible for two crimes committed by a single sale of narcotics); *Ebeling* v. *Morgan*, 237 U.S. 625 (1915) (five consecutive terms upheld for cutting six mail bags in one episode), or a single act that affects more than one person, *e.g.*, *Bell* v. *United States*, 349 U.S. 81 (1955) (Congress could have, but apparently did not, provide that carrying two women across state lines in one vehicle is two separately punishable crimes); *Ladner* v. *United States*, 358 U.S. 169 (1958) (Congress could have, but apparently did not, provide that firing one shot that injures two federal officers is two separately punishable crimes). See also *United States* v. *Long*, 524 F.2d 660 (9th Cir. 1975) (purchases of two pistols in a single transaction, where defendant uses the same false name, punishable by two consecutive prison terms); *United States* v. *Dioguardi*, 492 F.2d 70 (2d Cir.), cert. denied, 419 U.S. 873 (1974) (two stock purchases as part of one fraudulent scheme may be consecutively punished).

For example, a legislature could enact a statute providing that "[w]hoever is convicted of crime X shall be punished by 10 years in prison, and then shall be punished again by another five years in prison, and then shall be punished a third time by

paying a fine of $1000." Is there any difference between this provision and a provision that "[w]hoever is convicted of crime X shall be punished by 15 years in prison and a fine of $1000"? Clearly not. The former language is simply an eccentric way of stating what is more conventionally stated by the latter language.[22] Thus, a defendant who has been convicted of crime X and sentenced to a total of 15 years' imprisonment and a $1000 fine pursuant to the former provision has no double jeopardy argument, despite the fact that he literally has been punished three times for the "same offense" of committing crime X.

From this point it requires little elaboration to conclude that a legislature could provide that whoever commits crime X shall be punished by 10 years in prison and an additional five years for committing crime Y, a lesser included offense of crime X. To argue that crime Y is a lesser included offense of crime X would gain the defendant nothing when it came time for sentencing, for it would be perfectly clear that the legislature intended to punish the commission of the lesser included offense by adding five years to the sentence imposed for the greater offense. And a defendant would add nothing to his argument by demonstrating that crime Y might be the "same offense" as crime X in the sense that all its elements were also elements of crime X. The fact would remain that the legislature, in carrying out its duty to

[22] See Note, *Twice in Jeopardy*, 75 Yale L.J. 262, 302 (1965).

define crime and ordain punishment, had provided a certain punishment for those who committed both crime X and crime Y. Nothing in the Double Jeopardy Clause or elsewhere in the Constitution prohibits the legislature from carrying out its duty in this fashion.

Of course, legislatures do not normally provide criminal penalties in such circumlocutory fashion. Instead of providing a 10-year prison term followed by a five-year prison term, they normally provide simply a 15-year term. Where necessarily included lesser offenses are involved, legislatures normally express their intent by providing a certain punishment for the lesser offense and a more severe punishment for the greater. Compare, *e.g.*, D.C. Code Ann. § 22-504 (assault punishable by $500 fine, or up to 12 months' imprisonment, or both); D.C. Code Ann. § 22-501 (assault with intent to kill punishable by two to 15 years' imprisonment). But a legislature's normative practice is beside the point,[23] which is simply that, when a claim is made, as it is here, that a defendant has been sentenced to multiple punishments in violation of the Double Jeopardy Clause, such a claim cannot be decided merely by concluding that the offenses for which the defendant stands cumulatively punished might be the "same offense"

[23] This Court has found it instructive, when deciding whether multiple punishment is authorized, to determine whether the legislature could have provided the punishment imposed on the defendant by a circumlocutory definition of crimes and punishments. See *Gore* v. *United States*, *supra*, 357 U.S. at 392-393.

for purposes of invoking the Clause's protection against successive prosecutions. The legislature is free to punish the offense or offenses in a variety of ways, and if the sentence imposed does not exceed what the legislature has authorized, the defendant has received all the protection the Double Jeopardy Clause affords. See *Brown* v. *Ohio*, *supra*, 432 U.S. at 165.

It is therefore useless for petitioner to establish that his conviction for rape would have precluded a successive prosecution for felony murder based on that rape. He must establish, rather, that the trial court, in imposing separate sentences for rape and felony murder in a single sentencing proceeding following a single trial, has exceeded its legislative authorization by imposing multiple punishments where the legislature did not authorize them. This petitioner has failed to do.

3. *The "Blockburger Test" Is Not the Exclusive Standard for Determining Whether a Defendant May Be Consecutively Sentenced*

Consistent with the distinction that has been drawn between the two aspects of double jeopardy we have just discussed, this Court has recognized that the standards for determining what action violates the successive-prosecution protection, and what action violates the multiple-punishment protection, are not necessarily the same. See *Brown* v. *Ohio*, *supra*, 432 U.S. at 166-167 n.6. For example, Justice

Brennan, who has consistently maintained that the Double Jeopardy Clause normally requires the prosecution to bring all charges arising out of one transaction in a single trial (see, *e.g.*, *Thompson* v. *Oklahoma*, 429 U.S. 1053 (1977) (Brennan, J., dissenting)), has nevertheless made clear that this is "an entirely different constitutional issue" from multiple punishments, *Abbate* v. *United States*, 359 U.S. 187, 198 (1959) (opinion of Brennan, J.); *Ashe* v. *Swenson*, *supra*, 397 U.S. at 448-460 (concurring opinion), and that the Clause does not, as a general matter, "prohibit the imposition at one trial of cumulative penalties for different crimes committed during one transaction." *Ashe* v. *Swenson*, *supra*, 397 U.S. at 460 n.14 (concurring opinion).

Petitioner nonetheless asserts (Br. 10-13) that the *Blockburger* test is the constitutional criterion for determining whether cumulative punishment may be imposed. But this Court has never had occasion in previous cases to make a definitive pronouncement on the question. Indeed, petitioner fails to cite a single case (and we are aware of none) in which this Court struck down consecutive sentences on constitutional grounds because two offenses were found to be the "same" under the *Blockburger* test. The Court has either upheld multiple punishments after finding that each offense requires proof of different elements, *e.g.*, *Carter* v. *McClaughry*, 183 U.S. 365 (1902); *Morgan* v. *Devine*, 237 U.S. 632 (1915); *Gore* v. *United States*, *supra*, or it has struck down cumulative penalties as a matter of statutory construction,

without deciding whether the offenses are the "same" under *Blockburger*. *E.g.*, *Simpson* v. *United States*, 435 U.S. 6, 11-13 (1978); *Jeffers* v. *United States*, *supra*, 432 U.S. at 155-158 (plurality opinion); *Bell* v. *United States*, *supra*; *Ladner* v. *United States*, *supra*.

Petitioner's argument focuses on certain language in the opinion in *Brown* v. *Ohio*, *supra*. The Court in *Brown* stated, quite correctly, that the *Blockburger* test was established to determine whether two offenses were sufficiently distinguishable to permit the imposition of double punishments. 432 U.S. at 166. The Court then proceeded to adopt that test to adjudicate the question whether Brown's second prosecution was barred. In doing so the Court said: "If two offenses are the same under [the *Blockburger*] test for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions." *Ibid.* But this statement should not be read to decide that the *Blockburger* test is conclusive with regard to the constitutionality of multiple punishments, for it would then be inconsistent with this Court's recognition elsewhere in *Brown* that "[w]here consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee [against double jeopardy] is limited to assuring that the court does not *exceed its legislative authorization* by imposing multiple punishments for the same offense." 432 U.S. at 165 (emphasis supplied).

Moreover, the language in *Brown* upon which petitioner relies was unnecessary to the Court's decision, since *Brown* was a successive-prosecution case, not a multiple-punishment case. Brown first raised his Double Jeopardy claim when he was indicted for the auto theft following his trial, conviction and punishment for joyriding. 432 U.S. at 163. Later, he pleaded guilty to the theft only on condition that his double jeopardy claim would be considered. When the court rejected that claim, it imposed sentence on the guilty plea, but it is clear that Brown's double jeopardy objection was to the second prosecution; it ripened before his punishment and was independent of the punishment.

In addition, there is evidence in *Jeffers* v. *United States*, *supra*, that petitioner's reliance on the *Brown* dictum is unfounded. In *Jeffers*, the petitioner was successively tried, successively convicted, and cumulatively punished for what this Court assumed to be a greater and a lesser included offense. 432 U.S. at 150 (plurality opinion); *id.* at 158 (opinion of Stevens, J.). The plurality first concluded that petitioner's request for separate trials created an exception to the rule established in *Brown* that the Double Jeopardy Clause prohibited successive prosecutions for a greater and a lesser included offense. *Id.* at 150-154. The plurality then turned to the multiple-punishment question, addressing the defendant's argument that the punishment he had received as a result of two convictions exceeded the maximum punishment authorized for the greater offense.

In addressing this issue, the plurality stated: "The critical inquiry is *whether Congress intended* to punish each statutory violation separately." 432 U.S. at 155 (emphasis added). "If some possibility exists that * * * two statutory offenses are the 'same offense' for double jeopardy purposes, * * * it is necessary to examine the problem closely, in order to avoid constitutional multiple punishment difficulties." *Ibid.* Only after examining the "comprehensive penalty structure" (*id.* at 156), the legislative history (*id.* at 156 & n.26), and the applicability of the policy justifying separate crimes for conspiracy and the substantive offense (*id.* at 156-157) did the plurality conclude that Congress had in fact not intended cumulative punishment for the two particular offenses involved in that case. This approach is consistent with our submission that the permissibility of cumulative punishment is a function of legislative intent.[24]

Harris v. *Oklahoma*, *supra*, is also consistent with our analysis. As we have previously shown (see

[24] Nor does anything in Justice White's separate opinion (432 U.S. at 158) or in Justice Stevens' opinion, joined by three other Justices, lend any support to petitioner's reading of *Brown*. Justice White would have upheld the cumulative punishment, and Justice Stevens concluded that the second prosecution violated the Double Jeopardy Clause. It is thus reasonable to assume that Justice Stevens, and those Justices who joined his opinion, concurred in the reduction of the punishment because they believed the second trial itself was unconstitutional (see note 18, page 33, *supra*), and not necessarily because they believed, as petitioner does, that *Blockburger* governs the constitutionality of cumulative punishments imposed after a *single* trial.

pages 28-29, *supra*), *Harris*, like *Brown*, was a successive prosecution case. The Court in *Harris* did not even address the question whether the two offenses—felony murder and armed robbery—for which the defendant was separately prosecuted were the "same" offense under *Blockburger*. The successive prosecutions in *Harris* were barred, not because the offenses were the "same" (indeed, we submit they are not), but to protect the defendant from having to "run the gantlet" of a second prosecution. In any event, the Court in *Harris* had no occasion to and did not address the question whether consecutive punishments for the murder and the robbery could have been imposed on Harris had he been tried on both charges at a single trial.

Moreover, acceptance of petitioner's position that cumulative punishments are prohibited whenever successive prosecutions would be prohibited presents serious consequences. To illustrate our point, let us return to the hypothetical legislature that enacts a statute providing that whoever commits crime X shall be punished by 10 years in prison and, for committing the lesser included offense of crime Y, shall be punished by an additional five years. See page 40, *supra*. If, as petitioner claims, the *Blockburger* test governs the constitutionality of cumulative punishment, a defendant who committed both offenses could be sentenced only to 10 years in prison. This result would be squarely contrary to the legislature's unmistakable intent. The fact that the legislature chose to express that intent in a way that did not define

two distinct crimes under the *Blockburger* analysis would be no reason to hold that the additional five-year sentence is prohibited by the Double Jeopardy Clause. The *Blockburger* test, after all, was devised as a means of ascertaining legislative intent. *Iannelli* v. *United States, supra,* 420 U.S. at 785 n.17. To hold that legislative intent, no matter how clearly expressed, will be ignored unless it conforms to the *Blockburger* test would unjustifiably stand the *Blockburger* test on its head. It is one thing to hold, as *Blockburger* did, that the presence of distinct statutory elements demonstrates a legislative intent to allow cumulative punishment; it is quite another to use the distinct-offense test of *Blockburger* to thwart legislative intent, and this Court has never done so.

Our concern with petitioner's approach is not merely hypothetical. Under petitioner's analysis, a federal district court could never impose consecutive sentences upon a defendant convicted both of using or carrying a firearm in the commission of a federal felony pursuant to 18 U.S.C. 924(c) and of the underlying felony, despite statutory language unequivocally expressing congressional intent to permit such sentences; the predicate felony is, after all, a "lesser included offense" of the firearms charge in exactly the same sense that rape is a lesser included offense of felony murder, viz., the jury necessarily must find the commission of an underlying felony to convict under Section 924(c). Similar problems may arise with respect to a number of other federal statutes, *e.g.*, 18 U.S.C. 1962 (conduct of enterprise through a pattern

of racketeering activity); 21 U.S.C. 848 (continuing criminal enterprise involving substantive narcotics offenses), as well as with state laws.[25]

Petitioner, however, appears to qualify his absolute "rule" by conceding (Br. 23 n.10) that it may indeed be possible to punish consecutively for violations of what he calls greater and lesser included offenses (but what more precisely may be termed "compound" and "predicate" offenses) in certain limited circumstances where the statutory scheme resembles "traditional enhancement provisions." But if Congress could have accomplished the result through an enhanced sentencing procedure, it should be permitted, if it chooses, to create a separate felony firearm offense (or in this case, a separate felony murder offense), since the effect and purpose are precisely the same as those of the "traditional enhancement provisions." Petitioner's approach simply fails to acknowledge the independent role of the legislature in defininining conduct as criminal and in determining appropriate sentences. If the enhanced sentence statute is constitutional (and petitioner appears to concede as much), it is because the legislative intent to

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[25] In *Cassius* v. *Arizona*, cert. dismissed as improvidently granted, 420 U.S. 514 (1975), the Court had before it an Arizona statute making it an offense to commit a felony while released on bail, and providing additional punishment for that offense. The Supreme Court of Arizona had ruled that consecutive punishment in that instance did not offend double jeopardy (110 Ariz. 485, 520 P.2d 1109 (1974)); under petitioner's argument, the statutory provision of separate punishment would be unconstitutional.

punish cumulatively renders inapplicable any independent constitutional policy against multiple punishment. And if the constitutional question is one of ascertaining legislative intent, then Congress should be free to express its intent to punish consecutively greater and "lesser included" offenses.

Petitioner's argument draws its support largely from labels ("same offense", "greater and lesser-included offenses") and isolated statements taken from prior opinions of this Court addressing problems essentially different from those of this case. Apart from its logical flaws, the argument is contrary to common sense. Rape (or burglary, or kidnapping, or arson) combined with homicide makes for a very odd pair of greater and lesser "included" offenses. Common sense tells us that assault is in fact a lesser included offense of assault with a deadly weapon, because one cannot assault with a deadly weapon unless one assaults. Similarly, manslaughter is in fact a lesser included offense of murder, because one cannot kill with deliberation or malice aforethought unless one kills. When we look to the *Blockburger* test to define "lesser included offenses" such as these, we merely confirm what common sense already tells us. On the other hand, common sense tells us that rape and murder are not greater and lesser included offenses in any real sense, for one can certainly rape without killing or kill without raping. If the rape is a lesser "included" offense of murder it is so, not because it necessarily took place as part of the killing, but only

because the legislature has defined first degree murder to include a killing committed in the course of committing a rape.

But even assuming that the *Blockburger* test as applied to *necessarily* included offenses sets a constitutional limit on multiple punishment and thus should, for example, bar consecutive sentences for assault and assault with a deadly weapon, the same result does not necessarily follow with respect to "felony murder" and the felony that is proven along with it.[28] *Blockburger* was not devised to limit punishments for "compound" and "predicate" offenses such as felony murder and the underlying felony, and, more importantly, it does not reflect reality when it is applied in that context. Indeed, no "lesser included offense" rule can serve well in the felony murder context, because rape (or burglary or kidnapping) is never a truly included offense of

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[28] The question of consecutive sentences for true greater and lesser included offenses is unlikely to arise with any great frequency, since the defendant may avoid the problem by requesting the trial court to instruct the jury that it need not deliberate on the lesser included offense if it finds the defendant guilty of the greater offense. See *Jeffers* v. *United States*, *supra*, 432 U.S. at 153-154 (plurality opinion). Cf. *United States* v. *Gaddis*, 424 U.S. 544, 550 (1976). Petitioner could not ask for such an instruction in this case because in the District of Columbia as in other jurisdictions, a defendant charged with first degree (felony) murder is not entitled to a lesser included offense instruction with respect to the predicate felony (see page 67 *infra*).

murder; they are distinct acts, one committed independently of the other. The legislature has simply made the felony do service as a sort of constructive murderous intent, in order to upgrade what might otherwise be a second degree murder or a manslaughter (see pages 62-67, *infra*). But the mere fact that evidence of the same criminal intent—to commit the underlying felony—suffices to prove both felony murder and the underlying felony when both are separately charged does not bar the imposition of consecutive sentences. "[T]he test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent and are such as are made punishable by the act of Congress." *Morgan* v. *Devine*, *supra*, 237 U.S. at 640.

The question, at bottom, should always be legislative intent. Congress and other legislatures that follow the common law rule (see pages 63 to 66, *infra*) allow the jury to infer intent to kill from what it must first find to be intent to commit rape or another felony, but the legislature has not thereby directed the court to ignore the commission of the felony when time comes to sentence for murder. The fact that the definition of felony murder incorporates commission of the felony itself is different from the fact that the definition of assault with a deadly weapon incorporates the definition of assault. Assault with a

deadly weapon, or assault with intent to kill, is an aggravated form of assault, and thus punishable more severely than simple assault. But killing a person is not an aggravated form of rape; the fact that the prosecution must prove the rape on its way to proving the killing if it is to secure a first degree murder conviction without proof of deliberation or malice may be a restriction on the prosecution, but it is not a restriction on the sentencing court. The court must look to whether the legislature has provided for multiple punishments.

II

THE DETERMINATION BY THE HIGHEST COURT OF THE DISTRICT OF COLUMBIA THAT THE APPLICABLE LOCAL STATUTES AUTHORIZE CONSECUTIVE PUNISHMENTS FOR RAPE AND FOR A MURDER COMMITTED IN THE COURSE OF THAT RAPE IS CORRECT AND SHOULD NOT BE OVERTURNED

We have argued above that the dispositive question in determining whether the Double Jeopardy Clause prohibits a particular set of consecutive punishments, imposed in a single sentencing proceeding following a single trial that results in conviction of two or more offenses arising out of the same episode, is whether the total sentence exceeds that authorized by the legislature in the circumstances. In the absence of direct evidence of legislative intent, the

Blockburger test is an important device for answering the question; but, if we are correct, it is not invariably conclusive. Cases such as *Simpson* v. *United States*, *supra*, show that cumulative punishment may be barred, in accordance with the will of the legislature, for offenses that are "different" under the *Blockburger* test. Conversely, multiple punishments (such as fine, imprisonment, and probation or special parole) are routinely imposed for a single offense, when authorized by statute. The same direct focus upon legislative authorization, we have argued above, is the governing inquiry in considering the allowable punishment for separately defined offenses, whether or not they are arguably the "same offense" under the constitutional analysis governing the permissibility of successive prosecutions.

In the present case, the District of Columbia Court of Appeals, construing criminal statutes applicable solely to the District of Columbia, determined that the consecutive sentences imposed upon petitioner were authorized under those statutes. The correctness of that construction was not presented to this Court in the petition for a writ of certiorari as an issue for review in this case. Both these considerations strongly suggest that this Court should not now undertake to review the conclusion of the court below that the sentences imposed herein were legislatively authorized, but that it should decide this case on the premise that this conclusion was correct as a matter of statutory construction. But if this Court

does decide to review the issue of statutory authorization for the sentence imposed upon petitioner, we argue below that the court of appeals was correct in concluding that the sentence was consonant with legislative authorization.

A. This Court Should Not Review The Construction Given By The Highest Court Of The District Of Columbia To A Statute Of Purely Local Application

In his petition for certiorari, the sole question presented by petitioner involved the constitutionality, under the Double Jeopardy Clause of the Fifth Amendment, of the consecutive sentences imposed upon him for rape and first degree (felony) murder. In his brief on the merits, however, petitioner for the first time argues (Br. 26-39) that Congress did not intend to authorize the punishment imposed upon him and that the court of appeals erred in reaching the contrary conclusion. We submit that this Court should not undertake to review the non-constitutional aspects of the court of appeals' decision, which involve the construction of statutes applicable solely within the District of Columbia.

Petitioner contended below that his conviction for rape, and his consecutive sentence therefor, should be vacated because under District of Columbia law the rape merged with the felony murder conviction; he argued also that such a result was required by the Double Jeopardy Clause. Pet. Ct. App. Br. 76-81. The court of appeals rejected this argument. It recognized that "[m]erger of two offenses is ordinarily appropriate when the lesser offense consists entirely

of some but not all of the elements of the greater offense," A. 14 (citations omitted). But, said the court, "[i]n determining whether merger is appropriate, this court has refused to analyze solely by abstract consideration of the statutes involved or the wording of the indictment, and has looked instead to the societal interests protected by the statutes under consideration." *Id.* at 15 (citations omitted).

The court then held that the societal interests served by the rape statute (to protect women from sexual assault) and that served by the felony murder statute (to protect human life) are "separate and distinct" (A. 15) and that there was no evidence to suggest that Congress intended the offenses to merge (*id.* at 16). The court of appeals also concluded that "while the underlying felony is an element of felony murder it serves a more important function as an intent-divining mechanism" (*id.* at 17). Thus, the court held, "rape is not a lesser included offense of felony murder and * * * merger is inappropriate even absent societal interest analysis." *Ibid.* The court of appeals thus took two paths to arrive at the conclusion that Congress had not intended felony murder and the underlying felony to merge; each was deemed to dictate its holding that consecutive sentences for the two offenses were authorized.

Whether the foregoing ruling be viewed as one of statutory construction or of local common law, this Court should accept it as dispositive of the nonconstitutional issues in this case. It has long been the practice of this Court to decline review of decisions of the District's courts on common-law questions of evidence and substantive criminal law (see, *e.g.*, *Griffin* v. *United States*, 336 U.S. 704, 717-718 (1949); *Fisher* v. *United States*, 328 U.S. 463, 476 (1946)), and the Court has recently stated that "the same deference is owed the courts of the District with respect to their interpretation of Acts of Congress directed toward the local jurisdiction." *Pernell* v. *Southall Realty*, 416 U.S. 363, 367 (1974). Particularly in light of the reorganization of the District's court system in 1970,[27] which was designed in substantial part to enhance the status of the District of Columbia Court of Appeals and to place it on a footing comparable to that of the highest court of a state,[28] "the decisions of the District of Columbia Court of Appeals on matters of local law—both common law and statutory law—will be treated by this Court in a manner similar to the way in which we treat decisions of the highest court of a State on questions of state law" (*id.* at 368).

These principles clearly dictate that the Court should not in this case consider petitioner's contention that the court of appeals misconstrued local law in holding that cumulative punishments were statutorily authorized. While the Court retains power under Article III to consider the claim, such consideration

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[27] See generally District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473.

[28] See H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 35 (1970); cf. 28 U.S.C. 1257.

would be appropriate only in " 'exceptional situations where egregious error has been committed' " (*Pernell* v. *Southall Realty*, *supra*, 416 U.S. at 369, quoting *Fisher* v. *United States*, *supra*, 328 U.S. at 476). This is plainly not such a situation.

B. Petitioner's Failure To Raise The Statutory Construction Issue In His Petition Also Justifies A Refusal To Review It

Petitioner presented one question in his petition for certiorari: "Whether the doctrine of merger of offenses, an integral part of the Double Jeopardy Clause of the Fifth Amendment to the Federal Constitution, precludes the * * * trial court[] from imposing consecutive sentences on * * * petitioner Whalen for felony-murder and the underlying offense of rape * * *" (Pet. 3-4). He contended that the conclusion of the District of Columbia Court of Appeals that the two offenses did not merge was constitutional error and that, under the *Blockburger* test, the offenses "are considered 'the same offense' because one 'merges' into the other" (*id.* at 8). Petitioner concluded that "because proof of the felony supplies vital elements of the first degree murder charge * * * cumulative punishment for both felony-murder and the underlying felony violates the Double Jeopardy Clause" (*id.* at 10-11).

Thus, until now petitioner has taken no issue with the court of appeals' conclusion that Congress intended to permit cumulative punishments for felony murder and the underlying felony. The question he presented was simply whether cumulative punishment violates the Double Jeopardy Clause. Only in

his brief on the merits has he rephrased the "Question Presented" (compare Pet. 3-4 with Br. 2) and argued that Congress did not intend to authorize cumulative punishment. (The arguments set forth at Br. 26-39 were not presented to the court of appeals either).

It is axiomatic that this Court will ordinarily consider "[o]nly the questions set forth in the petition or fairly comprised therein * * *." Sup. Ct. R. 23(1)(c). See, *e.g.*, *General Talking Pictures Co.* v. *Western Electric Co.*, 304 U.S. 175, 177-178 (1938); R. Stern & E. Gressman, *Supreme Court Practice* § 6.27 (5th ed. 1978). Although the question of the existence of legislative authorization is critical to any inquiry into the constitutional permissibility of cumulatve punishments, it cannot be said that the question whether Congress intended to permit cumulation of punishment for felony murder and the underlying felony is fairly comprised within the question whether the Double Jeopardy Clause bars such punishment because of the nature of the offenses themselves. In other words, the petition was predicated entirely on the assumption that neither the legislature nor the courts may constitutionally bring about consecutive sentences for rape and felony murder because the offenses are the "same" for double jeopardy purposes (see also Br. 22-24). The answer to this question does not inherently depend upon, or entail, the kind of inquiry into legislative debate and intentions that petitioner now invites the Court to undertake.

It is true that the Court's practice of declining to review questions not presented in the petition is not without exceptions for extraordinary circumstances (see discussion in Stern & Gressman, *supra*). In the present case, however, no such circumstances exist; to the contrary, the fact that the arguments petitioner now presents for the first time are addressed to matters of local law reinforces the propriety of adhering in this case to the general principle that questions not presented in the petition will not be decided by the Court.

C. Congress Intended To Allow Consecutive Sentences For Felony Murder and Rape

Should the Court nevertheless choose to review the court of appeals' holding that the local District of Columbia statutes authorize the sentences imposed upon petitioner, we submit that an examination of congressional intent demonstrates that the sentences are legislatively authorized.

The inquiry into whether Congress has authorized cumulative punishment is generically similar to any other inquiry to determine congressional intent. After analyzing the language of the statutes themselves, one looks to the pertinent legislative history, *Simpson* v. *United States*, *supra*, 435 U.S. at 13; the purpose and structure of the statutes, *Iannelli* v. *United States*, *supra*, 420 U.S. at 787-789; their historical ancedents at common law, *Callanan* v. *United States*, 364 U.S. 587, 589-591 (1961); the circumstances under which they were enacted, *Gore* v. *United States*, *supra*, 357 U.S. at 390-391; *Simpson* v. *United States*,

supra, 435 U.S. at 18 (Rehnquist, J., dissenting); and appropriate canons of statutory construction in the absence of a "discernible legislative judgment," *Iannelli* v. *United States*, *supra*, 420 U.S. at 786. As we show in this section, such an inquiry in this case demonstrates that Congress intended to authorize courts in the District of Columbia, in their discretion, to impose consecutive sentences in the circumstances of this case.

At the outset of this inquiry, we acknowledge that "[w]hen Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Bell* v. *United States*, 349 U.S. 81, 83 (1955); *Simpson* v. *United States*, *supra*, 435 U.S. at 14-15. But as this Court has also recognized, the rule of lenity, "as is true of any guide to statutory construction, only serves as an aid for resolving an ambiguity; it is not to be used to beget one." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961) (footnote omitted). See also *United States* v. *Culbert*, 435 U.S. 371, 379 (1978); *United States* v. *Batchelder*, No. 78-776 (June 4, 1979), slip op. 7. "The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan* v. *United States*, *supra*, 364 U.S. at 596. See also *Scarborough* v. *United States*, 431 U.S. 563, 577 (1977).

1. *Felony Murder And The Underlying Felony Were Discrete Offenses At Common Law*

The statute under which petitioner was convicted of first degree murder (D.C. Code Ann. § 22-2401) provides four definitions of first degree murder: a purposeful killing with deliberate and premeditated malice; a killing by means of poison; a purposeful killing in the course of committing (or attempting to commit) any felony; and a homicide, without the purpose to kill, in the course of committing (or attempting to commit) arson, rape, mayhem, robbery, kidnapping, or, if armed, housebreaking. In connection with the last of these definitions, it has been stated: "[B]y eliminating the element of 'purpose' with respect to these * * * serious felonies, Congress intended to apply the common law felony murder rule to them—that is, that a homicide committed in the course of their perpetration is murder because the 'malice' required for murder [at common law] can be *implied* from the commission of the felony." *United States* v. *Branic*, 495 F.2d 1066, 1069 (D.C. Cir. 1974) (emphasis in original; footnotes omitted). This conclusion can be illuminated by a brief examination of felony murder as it took shape in the common law.

At common law, offense categories were relatively few and distinct, *Ashe* v. *Swenson*, *supra*, 397 U.S. at 445 n.10, and the law distinguished, for example, among rape, arson and murder. See Note, *supra*, 75 Yale L. J. at 279. Homicides were divided into two categories, murder and manslaughter, with mur-

der requiring a showing of malice. See 4 W. Blackstone, *Commentaries* * 190. Malice could be either express or implied, and a killing committed in the course of a felony was considered murder because malice was implied by the actor's intent to commit the felony.[29] See *United States* v. *Branic*, *supra*, 495 F.2d at 1069; *United States* v. *Greene*, 489 F.2d 1145, 1168 (D.C. Cir. 1973) (Bazelon, C. J.; statement of reasons for granting rehearing en banc), cert. denied, 419 U.S. 977 (1974); *United States ex rel. Jackson* v. *Follette*, 462 F.2d 1041, 1047 (2d Cir.), cert. denied, 409 U.S. 1045 (1972); *Fuller* v. *United States*, 407 F.2d 1199, 1228 (D.C.

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[29] See 4 W. Blackstone, *supra* at 198-201:

> Express malice is when one, with a sedate deliberate mind and formed design, doth kill another; which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. * * *
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> Also in many cases where no malice is expressed the law will imply it, as, where a man wilfully poisons another; in such a deliberate act the law presumes malice, though no particular enmity can be proved. * * * And if one intends to do another felony, and undesignedly kills a man, this is also murder. Thus if one shoots at A. and misses him, but kills B., this is murder, because of the previous felonious intent, which the law transfers from one to the other. The same is the case where one lays poison for A., and B., against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder. So also if one gives a woman with child a medicine to procure abortion, and it operates so violently as to kill the woman; this is murder in the person who gave it.

Cir. 1968) (en banc), cert. denied, 393 U.S. 1120 (1969). Even an accidental killing, if perpetrated in the course of another felony, was deemed murder rather than manslaughter, on the theory of implied malice. See *Shanahan* v. *United States*, 354 A.2d 524, 526 (D.C. App. 1976); Arent and MacDonald, *The Felony Murder Doctrine and Its Application Under the New York Statutes*, 20 Cornell L. Q. 288, 292 (1935); Perkins, *A Re-examination of Malice Aforethought*, 43 Yale L. J. 537, 557-558 (1934).[30]

When homicides were subdivided by statute into murder in the first and second degrees and manslaughter, "the doctrine of felony murder was preserved, and the underlying felony was viewed as providing the 'premeditation' and 'deliberation' otherwise required for first degree murder, as well as malice, where necessary." *United States* v. *Greene*, *supra*, 489 F.2d at 1168 (Bazelon, C.J.). See *United States ex rel. Jackson* v. *Follette*, *supra*, 462 F.2d at 1048; *Commonwealth* v. *Watkins*, 379 N.E.2d 1040, 1049 (Mass. 1978); Wechsler and Michael, *A Rationale of the Law of Homicide: I*, 37 Colum. L. Rev. 701, 703-707 (1937); Arent and MacDonald, *supra*, 20 Cornell L. Q. at 294-295.

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[30] See 4 W. Blackstone, *supra*, at 192-193:

> And in general, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or in its consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter.

Under the common law, therefore, murder was but one offense, and the felony murder rule simply provided an alternative means of establishing malice.[31] Consistent with this view, the common law form of indictment for murder, charging a premeditated killing with malice aforethought, is sufficient in most jurisdictions to charge and convict a defendant for felony murder. See, *e.g.*, *Commonwealth* v. *Bastone*, 466 Pa. 548, 353 A.2d 827 (1976); *State* v. *Stancliff*, 467 S.W.2d 26 (Mo. 1971); *Rogers* v. *State*, 83 Nev. 376, 432 P.2d 331 (1967); *Allen* v. *State*, 199 Kan. 147, 427 P.2d 598 (1967); *State* v. *Reyes*, 209 Or. 595, 308 P.2d 182 (1957); *People* v. *Lytton*, 257 N.Y. 310, 314-315, 178 N.E. 290, 292 (1931); *People* v. *Nichols*, 230 N.Y. 221, 226-227, 129 N.E. 883, 884 (1921); Arent and MacDonald, *supra*, 20 Cornell L. Q. at 310 & n.127.[32] Because felony murder is one of several forms of first degree murder, where felony murder is charged the jury may be instructed on second degree murder or manslaughter as lesser in-

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[31] Because the intent to commit the underlying felony supplies the malice necessary to convict for murder, the underlying felony need not be consummated in order to invoke the felony murder doctrine. See D.C. Code Ann. § 22-2401 ("perpetrating or * * * attempting to perpetrate" an underlying felony). See also, *e.g.*, *State* v. *Pittman*, 118 Ariz. 71, 574 P.2d 1290, 1294 (1978).

[32] See also *State* v. *Barton*, 5 Wash.2d 234, 239, 105 P.2d 63, 67 (1940) (information charging a defendant with a killing with premeditation *and* while engaged in the commission of a robbery is not duplicitous since it charges only one crime, murder in the first degree; the reference to robbery is merely incidental to, and descriptive of, the murder).

cluded offenses, see *Fuller* v. *United States*, *supra*, 407 F.2d 1229-1230; Arent and MacDonald, *supra*, 20 Cornell L. Q. at 310 & n.132; cf. *Green* v. *United States*, *supra*, 355 U.S. at 194 n.14, and a defendant may not be separately punished for felony murder and any lesser degree of homicide.

On the other hand, the underlying felonies have not historically been considered lesser included offenses of felony murder. While the underlying felonies inherently involve a substantial risk to human life, at the same time these felonies are necessarily separate and distinguishable from the homicidal assault. See Arent and MacDonald, *supra*, 20 Cornell L. Q. at 290-291, 298-301; Wechsler and Michael, *supra*, 37 Colum. L. Rev. at 713-716, 744-745 & n.161; Perkins, *supra*, 43 Yale L. J. at 560-563. The reason for this limitation has been cogently stated (Arent and MacDonald, *supra*, 20 Cornell L. Q. at 298):

> Every time a homicide which is not justifiable or excusable is committed, the killer may be said to have been engaged in a felony. To hold him guilty of felony murder, however, would eliminate all existing distinctions between murder and manslaughter and their various degrees. A necessary qualification of the felony murder rule, therefore, is that the felony in which the defendant was engaged must have been independent of the homicide.

Thus, in the District of Columbia, as in other jurisdictions, the underlying felony in a felony murder prosecution must have elements "so distinct from that of the homicide as not to be an ingredient of the homicide." *Blango* v. *United States*, 373 A.2d 885, 889 (D.C. App. 1977). See also *State* v. *Foy*, 224 Kan. 558, 582 P.2d 281, 288 (1978); *Garrett* v. *State*, 573 S.W.2d 543, 545 (Tex. Crim. App. 1978); *People* v. *Moran*, 246 N.Y. 100, 102, 158 N.E. 35, 36 (1927); *People* v. *Nichols*, *supra*, 230 N.Y. at 226, 129 N.E. at 884. Furthermore, in the District of Columbia (and elsewhere) the defendant in a trial for felony murder is not entitled to have the jury instructed that the underlying felony is a lesser included offense of felony murder. See, *e.g.*, *Wheeler* v. *United States*, 165 F.2d 225, 229 (D.C. Cir. 1947), cert. denied, 333 U.S. 830 (1948); *Candler* v. *State*, 266 Ind. 440, 363 N.E.2d 1233, 1243 (1977); *People* v. *Nichols*, *supra*, 230 N.Y. at 225-228, 129 N.E. at 884-885.

Thus, felony murder and the underlying felonies traditionally have been regarded as discrete and independent offenses. Although lesser degrees of homicide have been considered lesser included offenses of felony murder, the underlying felonies have not been so regarded. And it was this historical background, as the court of appeals concluded in *Branic*, *supra*, that Congress intended to apply in the law of felony murder in the District of Columbia. As we now show, Congress, consistently with this history, considered felony murder and the underlying felonies as defined in the District of Columbia Code to be separate offenses for punishment purposes.

2. The History of the District's First Degree Murder Statute Shows That Felony Murder And Rape Are Separately Punishable Offenses

a. Congress first enacted a general code for the District of Columbia in 1901. Act of March 3, 1901,

ch. 854, 31 Stat. 1189. That code provided that "[w]hoever, being of sound memory and discretion purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, kills another, is guilty of murder in the first degree." Section 798, 31 Stat. 1321. Murder in the first degree carried a mandatory sentence of death by hanging.[33] Section 801, 31 Stat. 1321. Rape was made punishable by five to 30 years' imprisonment or, if the jury so provided, death by hanging. Section 808, 31 Stat. 1322.[34] In enacting the code, Congress provided that the common law would remain in force to the extent consistent with the code. Section 1, 31 Stat. 1189. There was no specific provision governing cumulation of sentences, although cumulation was clearly contemplated,

[33] Murder in the second degree was defined as any other homicide with malice aforethought (Section 800, 31 Stat. 1321) and was punishable by imprisonment for 20 years to life (Section 801, 31 Stat. 1321). Manslaughter was punishable by up to 15 years' imprisonment, or a fine of $1,000, or both (Section 802, 31 Stat. 1321).

[34] Until 1970, the punishment provided for rape under the D.C. Code remained unchanged. In response to *United States* v. *Jackson*, 390 U.S. 570 (1968), which held a similar federal death penalty provision invalid, Congress amended the rape statute to permit the imposition of a sentence of imprisonment "for any term of years or for life." Act of July 29, 1970, Pub. L. No. 91-358, Section 204, 84 Stat. 600. See H. R. Rep. No. 91-907, 91st Cong., 2d Sess. 66-67 (1970). Where a life sentence is imposed for rape, D.C. Code Ann. § 24-203(a) provides that the minimum term of imprisonment shall not exceed 15 years.

because Congress provided that "[c]umulative sentences aggregating more than one year shall be deemed one sentence" for the purpose of determining where the sentence was to be served. Section 934, 31 Stat. 1341.

It is not surprising that in 1901 Congress did not address the question whether a conviction of first degree murder (whether by means of felony murder or with deliberate and premeditated malice) could run consecutively to the sentence for another felony. The mandatory sentence for first degree murder was death; that sentence made any question of imprisonment for another crime superfluous.[35]

b. In 1940, Congress amended the 1901 murder statute to the form now contained in D.C. Code Ann. § 22-2401. Act of June 12, 1940, ch. 339, 54 Stat. 347.[36] What legislative history there is indicates that the change was effected to eliminate any element of purpose from felony murder. The Attorney General, recommending the change, stated that the word "purposely," placed in the statute so as to apply to felony murder as well as other types of first degree murder, had "no proper function" in connection with the

[35] Although in one English case, the defendant was sentenced to be "drawn for treason, hanged for robbery and homicide and disemboweled for sacrilege, beheaded as an outlaw and quartered for divers depredations." Note, *supra*, 75 Yale L.J. at 300, quoting 2 F. Pollock and F. Maitland, *History of English Law* 501 (2d ed. 1905).

[36] Congress carried forward the definition of second degree murder as contained in the 1901 Act, and as now found in D.C. Code Ann. § 22-2403.

former, and he recommended that the statute be changed to conform to the general practice of not requiring a purposeful killing for a felony murder conviction. S. Rep. No. 1175, 75th Cong., 1st Sess. 2 (1937). Congress accepted this proposal only in part, eliminating the requirement of a "purposeful" killing only for the six serious felonies and retaining it for homicides committed in the course of other felonies. D.C. Code Ann. § 22-2401. Because the mandatory death penalty remained unchanged for first degree murder, there was no more reason in 1940 than there had been in 1901 to deal with cumulative sentences, and Congress apparently did not consider the matter.

c. In 1962, Congress replaced the mandatory death penalty for first degree murder with the present language of D.C. Code Ann. § 22-2404, which allows, as an alternative, a sentence of 20 years to life imprisonment. Act of March 22, 1962, Pub. L. No. 87-423, Section 1, 76 Stat. 46. With the possibility of parole after 20 years for those convicted of first degree felony murder, the question whether such a sentence could run consecutively to a sentence imposed for the underlying felony became relevant for the first time. But Congress concentrated on the merits of abolishing the mandatory death sentence and did not expressly address the matter of consecutive sentences. Both the language and the history of Section 2404 indicate, however, that Congress intended the statutory penalties to apply with equal force to all defendants convicted of first degree mur-

der, whether their convictions rested upon the felony murder or premeditated murder provisions of Section 2401.

Section 2404 provides, with respect to the sentence of life imprisonment authorized for first degree murder:

> Notwithstanding any other provision of law, a person convicted of first degree murder and upon whom a sentence of life imprisonment is imposed shall be eligible for parole only after the expiration of twenty years from the date he commences to serve his sentence.

This language does not differentiate between defendants convicted of first degree murder under a "felony murder" theory and those convicted of first degree murder upon proof of "deliberate and premeditated" homicide. The penalty provisions refer simply to "a person convicted of first degree murder." Indeed, as petitioner himself concedes (Br. 35), the legislative record manifests Congress' belief that a person convicted of felony murder would be subject to the same penalty as one convicted of premeditated murder. See, *e.g.*, 108 Cong. Rec. 4128-4129 (1962) (remarks of Sen. Hartke). Since it is beyond serious dispute that Congress intended to permit imposition of consecutive sentences when a defendant is convicted of premeditated murder and another felony, such as rape, committed as part of the same transaction, the absence of any distinction between felony murder and premeditated murder strongly suggests that Congress must also have intended to authorize

cumulative punishments for felony murder and the underlying felony.[37]

The legislative history conclusively demonstrates that the purpose of the mandatory 20-year minimum sentence was to distinguish between the penalties for first and second degree murder. See S. Rep. No. 373, 87th Cong., 1st Sess. 2 (1961); H. R. Rep. No. 677, 87th Cong., 1st Sess. 2 (1961); 107 Cong. Rec. 12154 (1961) (remarks of Rep. Abernethy). Under the applicable provisions of law (which are still in effect), a defendant convicted of murder in the second degree could have received a sentence not exceeding 15 years to life imprisonment. See D.C. Code § 22-2403 and D.C. Code § 24-203(a). To ensure that all defendants convicted of murder in the first degree would be treated more severely than those convicted of second degree murder, "the language of this legislation would distinguish the parole eligibility of one sentenced to life imprisonment as the result of a first degree murder conviction. *Such an individual must serve at least twenty years before being eligible for the consideration of parole, notwithstanding any other provision of law,*" H. R. Rep. No. 677, *supra*, at 2 (emphasis added). See S. Rep. No. 373, *supra*,

[37] In support of the proposition that Congress believed persons convicted of felony murder deserving of less punishment than those convicted of premeditated murder, petitioner cites (Br. 36 n.23) a passage from a letter by former United States Attorney Acheson in support of the legislation. But the passage merely points out that a discretionary death penalty is preferable to a mandatory one because it allows for some variation in punishment based on the mitigating or aggravating circumstances of a given case.

at 2; 107 Cong. Rec. 12154 (1961) (Rep. Abernethy); 108 Cong. Rec. 4131 (1962) (Sen. Hartke).

It would totally undermine Congress' clear intent to deal more harshly with first degree murders to suggest, as does petitioner, (Br. 30 n.15), that while rape and second degree murder may always be punished consecutively [38] (for a total sentence of 30 years to life imprisonment), rape and first degree murder may not be consecutively punished (resulting in a maximum sentence of only 20 years to life) whenever the first degree murder conviction is based on a felony murder theory.[39] Moreover, by setting a minimum of "at least" 20 years before a defendant becomes eligible for parole consideration, Congress clearly contemplated the possibility that sentences for first degree murder, including felony murder, would run consecu-

[38] See *United States* v. *Butler*, 462 F.2d 1195 (D.C. Cir. 1972), upholding consecutive sentences for second degree murder, housebreaking and larceny.

[39] Contrary to petitioner's assertion (Br. 35 n.21) a conviction for felony murder does not necessarily imply a separate conviction for the underlying felony. It is only when the underlying felony is charged in a separate count of the indictment that a jury may convict, and sentence may be imposed, on both charges. The decision whether to charge the underlying felony under a separate count is a matter within the discretion of the prosecution. Thus, it is not surprising that, as petitioner notes (Br. 37), the debate on Senator Morse's proposed amendments (that life imprisonment without the possibility of parole be included as a sentencing option in addition to, or instead of, death and 20 years to life imprisonment) includes no comment concerning the cumulation of penalties for murder and another felony, since the debate focused on the appropriate punishment for one convicted only of the single offense of murder in the first degree.

tively to sentences for other crimes, presumably including the enumerated felonies underlying felony murder.

This development of the law of first degree murder demonstrates that Congress intended rape and first degree (felony) murder to constitute separate, and separately punishable, offenses. As petitioner concedes (Br. 30 n.15), Congress intended to punish the felony separately from the homicide when it was committed together with a second degree murder, and there is no evidence that Congress intended a different (and more lenient) rule for first degree murder.

3. *The Murder and Rape Statutes Protect Different Societal Interests*

Historical development and legislative history are not the only means of ascertaining legislative intent in this area. Another means of determining whether the legislature intended to punish violations of two statutory provisions separately is to ask whether the statutes are designed to implement different social policies. "If the same acts violate different federal statutes protecting separate federal interests those interests can be adequately protected at a single trial by the imposition of separate sentences for each statute violated." *Abbate* v. *United States*, *supra*, 359 U.S. at 200 (separate opinion of Brennan, J.). See *Ashe* v. *Swenson*, *supra*, 397 U.S. at 460 n.14 (Brennan, J., concurring).

The societal interest analysis has been employed to ascertain, with respect to a variety of statutes,

whether Congress intended to authorize the imposition of consecutive sentences. See, *e.g.*, *United States* v. *Butler*, 462 F.2d 1195, 1199 (D.C. Cir. 1972) (second degree murder, housebreaking, and larceny); *Irby* v. *United States*, 390 F.2d 432, 433-434 (D.C. Cir. 1967) (en banc) (housebreaking and robbery); *Rouse* v. *United States*, 402 A. 2d 1218 (D.C. App. 1979) (armed robbery and carrying a pistol without a license). See also Note, *supra*, 75 Yale L.J. at 320-321; Kirchheimer, *The Act, The Offense and Double Jeopardy*, 58 Yale L.J. 513, 522-523 (1949).[40] In the present case, the court of appeals concluded from this analysis that

> the societal interests which Congress sought to protect by enactment of D.C. Code 1973, § 22-2401 (felony murder) and § 22-2801 (rape) are separate and distinct. The rape statute is to protect women from sexual assault. The felony murder statute purports to protect human life * * *.

(A. 15; footnote omitted).[41] See also *United States* v. *Greene*, *supra*, 489 F. 2d at 1169 (Bazelon, C.J.).

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[40] The societal interest test has also been employed by courts to determine whether two offenses are related to each other as greater and lesser included offenses for jury instruction purposes. (Fed. R. Crim. P. 31(c)). See *United States* v. *Stolarz*, 550 F.2d 488, 491 (9th Cir. 1977); *United States* v. *Whitaker*, 447 F.2d 314, 318 (D.C. Cir. 1971); *Hall* v. *United States*, 343 A.2d 35, 39 (D.C. App. 1975).

[41] The District of Columbia Court of Appeals has upheld separate convictions for felony murder and the underlying felony on this theory in other cases. See *McFadden* v. *United*

Petitioner asserts (Br. 28), however, that it is equally plausible to believe that the societal interests in guarding against rape and murder are both fully protected by the felony murder provision. But Congress made the felony murder provision of Section 2401 applicable whether or not the underlying felony was actually consummated (see note 21, *supra*). In addition, as Blackstone long ago observed (see note 29, *supra*) and the statute itself implies, the felony murder provision serves to protect the lives not only of the victim of the underlying felony but of all persons in close proximity to the commission of the felony, even including accomplices. These two factors —that an attempt to commit a felony is sufficient to trigger the provisions of the first degree murder statute and that the victims of the murder and of the underlying felony may differ—strongly indicate that Congress had in mind the protection of separate interests when it separately enacted the felony murder and the rape statutes.[42]

States, 395 A.2d 14, 17-18 (1978) (felony murder/mayhem); *Ellis* v. *United States*, 395 A.2d 404, 413 (1978) (felony murder/armed robbery); *Waller* v. *United States*, 389 A.2d 801, 808-809 (1978), appeal pending, No. 78-5928 (felony murder/attempted armed robbery); *Pynes* v. *United States*, 385 A.2d 772, 773-774 (1978), pet. for cert. pending, No. 78-5471 (see note 1, *supra*) (felony murder/armed kidnapping); *Harris* v. *United States*, 377 A.2d 34, 38 (1977) (felony murder/burglary); *Blango* v. *United States*, 373 A.2d 885, 889 (1977) (same).

[42] Contrary to petitioner's contention (Br. 29), there is nothing in Wechsler and Michael, *supra*, that suggests that felony murder necessarily embraces the same interests as the

Furthermore, while there is an inevitable overlap in the interests served by the felony murder provision and the various predicate felony statutes, "the recognition that the law of homicide serves other ends besides the prevention of homicide does not negate the point that its dominant purpose is the protection of life." Wechsler and Michael, *supra*, 37 Colum. L. Rev. at 729. It is clear that the rape and felony murder provisions have, as their "dominant purposes," the protection of different interests.[43]

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underlying felony. Indeed, Wechsler and Michael acknowledge that "when the actor's proximate end is itself criminal or otherwise undesirable, the use of means that involve a homicidal risk obviously cannot be justified." 37 Colum. L. Rev. at 744-745 (footnotes omitted). While noting that the felony murder rule has been criticized when applied in cases where the homicidal risk is not one that is or ought to be known to the actor, the authors point out that the rule does not "make criminal any behavior that would not otherwise be criminal. Whether or not the actor knew or ought to have known that his act was dangerous to life is relevant, however, to the issue whether or not the treatment employed should be that which we are prepared to use in the effort to prevent behavior that is dangerous to life." *Id.* at 745 n.161. The "treatment" employed by Congress to deter excessive violence in the commission of dangerous felonies was the prospect of punishment for felony murder in addition to the punishment imposed for the underlying felony.

[43] As a plurality of this Court pertinently observed in *Coker* v. *Georgia*, 433 U.S. 584, 597-598 (1977) (footnotes omitted):

> [R]ape * * * is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the "ultimate violation of self." It is also a violent

Petitioner nevertheless argues (Br. 31) that the felony murder provision is merely "a form of aggravated punishment for the felony itself, when aggravating consequences occur." This is wrong. Under the felony murder rule the defendant is not punished for the underlying felony itself, but for the homicide that accompanies the felony. This is evident from the fact that the punishment for first degree (felony) murder is exactly the same regardless of the nature of the predicate felony. Compare petitioner's brutal

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crime because it normally involves force, or the threat of force or intimidation, to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. Because it undermines the community's sense of security, there is public injury as well.

Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which "is unique in its severity and irrevocability," *Gregg* v. *Georgia*, 428 U.S., at 187, is an excessive penalty for the rapist who, as such, does not take human life.

See also 433 U.S. at 608 (opinion of Powell, J.); *id.* at 611-612 (Burger, C.J., dissenting).

rape and ensuing purposeful killing of his victim[44] with a defendant who steals a $200 watch from a store and then kills a store guard who attempts to prevent his escape: according to petitioner, each would be subject to exactly the same punishment, even though Congress has deemed rape a sufficiently serious offense to make it punishable by a maximum of 15 years to life imprisonment, while grand larceny is punishable by no more than 3 and 1/3 to 10 years' imprisonment (D.C. Code Ann. § 22-2201; § 24-203(a)). This equality of treatment under the murder statute, wholly without regard to the degree of social harm occasioned by the underlying felony (at least in the case of purposeful killings), refutes any suggestion that the penalty prescribed for felony murder is deemed also to redress the social harm occasioned by the felony.

4. *D.C. Code Ann. § 23-112 Authorizes Consecutive Sentences For Petitioner's Case*

The District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, contains a provision specifically authorizing the District of Columbia courts to impose a sentence such as petitioner received in this case. Section 210 of that Act, 84 Stat. 604, 610, added present Section 23-112 to the District of Columbia Code. It provides as follows:

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[44] While the jury did not have to find a purposeful killing in order to convict petitioner of felony murder, it necessarily made that finding in convicting him of second degree murder.

> A sentence imposed on a person for conviction of an offense shall, unless the court imposing such sentence expressly provides otherwise, run consecutively to any other sentence imposed on such person for conviction of an offense, whether or not the offense (1) arises out of another transaction, or (2) arises out of the same transaction and requires proof of a fact which the other does not.

The statute thus expresses a legislative policy, applicable by its literal terms to the facts of this case, in favor of consecutive sentencing for two offenses, regardless of their relationship to one another, unless the sentencing court expressly elects concurrency.

A consideration of the origin and purposes of this statute confirms the conclusion from its language that petitioner's statutory construction contentions are untenable. Section 23-112 was enacted to clarify the authority of the sentencing court by overruling two related lines of judicial decisions of which Congress disapproved. First, the provision was intended to overturn *Borum* v. *United States*, 409 F. 2d 433 (D.C. Cir. 1967), cert. denied, 395 U.S. 916 (1969), which had held that sentences imposed at different times for unrelated offenses were presumed to run concurrently with one another in the absence of an express specification at the time of the imposition of the second sentence that it was to be consecutive to the earlier one. See H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 113 (1970). To this end, the statute provides that sentences shall be consecutive unless the court provides that they be served concurrently.

The second issue that the statute addresses, and the one that more directly concerns us here, is sentencing for offenses arising out of the same transaction. To place this matter in perspective, it is necessary to consider what the governing law was in the District of Columbia prior to 1970, for the Committee specifically disapproved that law and changed it through Section 23-112. See H.R. Rep. 91-907, *supra*, at 114.

In *Ingram* v. *United States*, 353 F.2d 872 (D.C. Cir. 1965), the defendant was convicted of both assault with intent to kill and assault with a dangerous weapon, based on one assault with a knife. The two offenses were defined in different provisions of the D.C. Code, and each required proof of a fact that the other did not. See 353 F.2d at 856 (Burger, J., dissenting).[48] The trial judge sentenced the defendant to consecutive terms on each count, but the court of appeals reversed. Although the court recognized that the two offenses were distinct under *Blockburger*, it found it necessary to look beyond such "stereotyped formulae." 353 F.2d at 874. In doing so, the court found no clear indicia of intent to punish consecutively when both offenses arose out of the same assault, and it applied a rule of lenity to conclude that doubts on the matter should be resolved in favor of the defendant. It therefore held that consecutive sentences were illegal. Then-Circuit Judge Burger,

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[48] Assault with intent to kill required proof of that intent; assault with a dangerous weapon required proof of use of a dangerous weapon.

dissenting, would have affirmed the consecutive sentences on the ground that, by requiring different elements of proof for each offense, Congress had sufficiently indicated its intent that the offenses could be consecutively punished, and that further inquiry into its intent was unnecessary.

In *Davenport* v. *United States*, 353 F.2d 882 (D.C. Cir. 1965), decided by a different panel shortly afterwards, the court followed the analysis set forth in *Ingram* and concluded that consecutive sentences were illegal for assault with a dangerous weapon and manslaughter, because Congress had not clearly intended such. Finally, in *Smith* v. *United States*, 418 F.2d 1120 (D.C. Cir. 1969), the court followed *Ingram* and again invalidated consecutive sentences for assault with intent to kill and assault with a dangerous weapon. The court stated that, while consecutive sentences could be imposed where the "actions and intent of defendant constitute distinct successive criminal episodes," that was not the case there, where the defendant committed only a single assault. *Id.* at 1121.

In devising Section 23-112, the House Committee specifically disapproved *Ingram*, *Davenport* and *Smith*. It declared the general rule (which the cited cases acknowledged) that "whether or not consecutive sentences may be imposed depends on the intent of Congress." H.R. Rep. No. 91-907, *supra*, at 114. "Since Congress in enacting legislation rarely specifies its intent on this matter," the Committee continued, "courts have long adhered to the rule that

Congress did intend to permit consecutive sentences when each offense 'requires proof of a fact which the other does not.'" *Ibid.*, citing *Blockburger* v. *United States*, *supra*, and *Gore* v. *United States*, *supra*. The District of Columbia courts, the Committee said, "have retreated from this settled principle of law" in finding congressional intent not clear "despite the offenses being defined in separate provisions [of the D.C. Code]." *Ibid.* The Committee concluded:

> To obviate the need for the courts to search for legislative intent, section 23-112 clearly states the rule for sentencing on offenses arising from the same transaction. For example, a person convicted of entering a house with intent to steal and stealing therefrom shall be sentenced consecutively on the crimes of burglary and larceny unless the judge provides to the contrary.

The very least that is clear from Section 23-112, considering the House Committee's report, is that Congress was rejecting the rule of *Ingram*, *Davenport* and *Smith* that some evidence of congressional intent beyond the fact that Congress had delineated separate elements was required before a judge could impose consecutive sentences for crimes arising out of the same transaction. Henceforth, Congress said in enacting Section 23-112, if a defendant is convicted of two crimes arising out of the same transaction, a consecutive sentence is not illegal if each crime requires proof of an element that the other does not. In fact, said Congress, not only *may* the judge punish consecutively in such circumstances, the

sentences *shall* be consecutive "unless the court imposing * * * sentence expressly provides otherwise * * *." D.C. Code Ann. § 23-112.

The crucial inquiry in the present case is whether Congress meant that *only* in such circumstances (*i.e.*, where each offense requires proof of a fact that the other does not) may the judge sentence consecutively. Plainly it did not. Section 23-112 states that, unless the judge provides otherwise, sentences on two offenses shall run consecutively "whether or not" one requires a proof of a fact that the other does not. Had Congress intended to prohibit the judge from imposing consecutive sentences where the *Blockburger* test is not satisfied, it would have said "*if* (or "only if") *each* offense" instead of "whether or not the offense." Plainly, "if" and "whether or not" are not synonymous; they are in fact antonymous.[46]

In short, Congress has specifically provided in Section 23-112 for consecutive sentencing in cases such as petitioner's. In so arguing, we do not mean to suggest the implausible conclusion that Congress was authorizing consecutive sentences for a greater and a necessarily included lesser offense (such as armed robbery and robbery). That question, after all, would not often arise, since offenses standing in such a

[46] The District of Columbia Court of Appeals has relied on Section 23-112 in upholding consecutive sentences for offenses arising out of the same transaction where each requires proof of a fact that the other does not. *E.g.*, *Hammond* v. *United States*, 345 A.2d 140 (1975) (assault with a dangerous weapon and carrying a dangerous weapon); *Fowler* v. *United States*, 374 A.2d 856, 859-860 (1977) (larceny and false pretenses).

relationship to one another are not ordinarily charged in separate counts and thus produce only a single conviction. Moreover, since Congress would be so unlikely to have intended such a result, it would be proper to refuse to give the statute its literal meaning if such a case ever arose. But the question is entirely different in cases involving a predicate offense rather than a necessarily included one, since the result provided by the statutory language is well within the range of rational legislative policy choices (here, indeed, as shown above, the result is supported by history and reason).[47]

It may well be that, in enacting this statute, Congress was primarily concerned with offenses that were not greater and lesser included in any sense, but its words clearly addressed the instant circumstances. This Court is not at liberty to narrow the statute to apply only to the specific aspects of the problem that Congress had uppermost in mind, and then to provide precisely the opposite outcome for related aspects of the problem that may have been of lesser concern to Congress. Congress wrote the statute in a way that covers both situations. If there were some indication in the legislative history that Congress did not intend consecutive sentences where proof of one offense is a predicate to conviction on another, per-

[47] Nor do we suggest that the general provisions of Section 23-112 would override specific evidence of legislative intent, in connection with particular pairs of offenses, not to allow cumulative punishment, as in *Simpson* and *Jeffers*. There is, however, no such evidence here.

haps an argument could be made in petitioner's favor. But that is not the case. Congress was unmistakably removing restrictions that the District of Columbia Circuit had imposed on the trial court's discretion to provide for consecutive sentences, and in doing so Congress refrained from imposing substantive restrictions on the trial court. In sum, not only does Section 23-112 not prohibit the sentences imposed on petitioner, it affirmatively allows such a sentence "whether or not" the elements are the same.

CONCLUSION

The judgment of the District of Columbia Court of Appeals should be affirmed. If, however, the judgment is reversed, the case should be remanded to the court of appeals for the purpose of reinstating petitioner's sentence for second degree murder.[48]

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[48] The trial court sentenced petitioner to a term of from 15 years to life imprisonment for second degree murder. This sentence was to run concurrently with the sentence for first degree (felony) murder and, like that sentence, consecutively to the rape sentence. The sole reason for vacating this sentence on appeal was that second degree murder is a lesser included offense of first degree murder; since the court upheld the sentence on the latter charge, it followed that the sentence on the former should be vacated (A. 14). Petitioner acknowledges that there is no bar to consecutive sentences for rape and second degree murder (Br. 30 n. 15); should this Court now conclude that the sentences upheld by the court of appeals are invalid because the consecutive sentences for rape and felony murder may not coexist, the intentions of the sentencing court and the interests of justice call for reinstatement of the valid consecutive sentence for second degree murder (which would result in a total sentence of 30 years to life imprisonment, rather than the minimum of 35 years that petitioner now faces or the minimum of 20 years that would ensue from a simple reversal of the rape sentence). Thus, if this Court does accept petitioner's contentions, it should exercise its power under 28 U.S.C. 2106 and remand the case for correction of the sentence as described.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

ALLAN A. RYAN, JR.
Assistant to the Solicitor General

JEROME M. FEIT
ELLIOTT SCHULDER
Attorneys

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FOR ARGUMENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-5471

THOMAS W. WHALEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO
THE DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY BRIEF FOR PETITIONER

SILAS J. WASSERSTROM
WILLIAM J. MERTENS
W. GARY KOHLMAN
PUBLIC DEFENDER
SERVICE FOR THE
DISTRICT OF COLUMBIA
451 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 628-1200
Counsel for Petitioner.

Washington, D.C. • THIEL PRESS • (202) 638-4521

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-5471

THOMAS W. WHALEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI TO
THE DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY BRIEF FOR PETITIONER

In this reply brief, the petitioner will first address the respondent's contentions with respect to the constitutionality of the consecutive sentence imposed here. Then, he will consider the respondent's contention that Congress intended to permit consecutive sentences for felony murder and the underlying felony, and address the respondent's suggestion that this Court should altogether ignore this question of legislative intent.

I. THE CONSTITUTIONAL ISSUE

Petitioner argued in his brief that he could not, consistent with the Constitution, be sentenced consecutively upon his convictions for first degree felony murder (rape) and the underlying rape which was charged and proved as the predicate for that felony murder. This is because the rape was a lesser included offense of the felony murder. (Petitioner's Brief, at 13-22). As the Court of Appeals said, the rape is an element of the felony murder (rape). Thus it is the "same offense" for purposes of the Double Jeopardy Clause of the Fifth Amendment. (Petitioner's Brief at 8-13, 22-26). In its response, the government argues, first, that the felony on which a felony murder charge is premised is not, in fact, a lesser included offense of the felony murder, (Respondent's Brief, at 18-30), and second, that even if it is, the Double Jeopardy Clause permits multiple punishment for offenses standing in this relationship. (Respondent's Brief at 30-53). Since petitioner anticipated and met these very arguments in his intitial brief, lengthy response is unnecessary. There are, however, several points that need to be made.

To begin with, it is well to recognize that a good deal of the diffficulty in the government's argument is due to the fact that it fails to appreciate the actual and conceptual relationship between felony murder and the underlying felony. Only because of this failure can the government lay any claim to the support of common sense for its position.[1]

[1] On page 50 of its brief, respondent suggests that this Court reject petitioner's argument as "contrary to common sense". One may ask how helpful common sense actually is in this area of Double Jeopardy law. The man on the street would doubtless have more than a little trouble trying to wend his way through, say, *Iannelli v. United States*, 402 U.S. 770 (1975), or *Jeffers v. United*

[footnote continued]

Under the District of Columbia felony murder statute, as under most other such statutes, evidence of intent to commit an underlying felony, such as rape or robbery, does not, as the government would have it, merely "serve as evidence of intent to commit the murder as well" (Respondent's Brief at 12). The felony murder statute does not simply "allow the jury to infer intent to kill" from the intent to rape. (*Id.* at 52), For the jury is not instructed that it *may* find proof of a particular mental state such as premeditation, deliberation, or malice, from the fact that the killing occurred in the course of one of these felonies. Rather, the jury is told, as it was here, that if it finds that the killing occurred in the course of such a felony, even if the killing is entirely accidental, this *is* murder in the first degree. In other words, proof of the felony is not an "intent divining mechanism," as the lower court put it; rather, it is a mechanism which eliminates altogether the government's need to prove any criminal intent with respect to the killing.

Thus it is simply not true, as respondent contends several times in its brief, that to be guilty of felony murder the defendant necessarily "performs two separate acts" (Respondent's Brief at 27), which are "each committed independently of the other." (*Id.* at 52). If, for example, in the course of a purse snatch, the victim falls down and strikes her head, dying as a result, this is first degree felony murder. So also is an accidental killing by the defendant, or even his accomplice.[2] *See e.g. Mum-*

States, 432 U.S. 137 (1977). But, moreover, as petitioner will show, to the extent that common sense is relevant to the resolution of such issues, it is the government's position, not his own, that is in fact contrary to common sense.

[2] Liability under the felony murder rule has even been held to extend to cases where it is an accomplice, rather than the intended

[footnote continued]

forde v. United States, 130 F.2d 411 (D.C. Cir.), *cert. denied*, 317 U.S. 656 (1942). Where the killing in fact results from a separate act, the government may well be able to charge and prove either premeditated murder or, as it did here, second degree murder (with malice), as well as the underlying felony. Where it does so, consecutive sentences would, as petitioner acknowledged in his brief, unquestionably be constitutional. But where the killing is predicated and proved as a first degree murder only upon proof of the underlying felony, then the felony is in fact a lesser included offense, for in proving such a murder all the elements of the felony must necessarily be proved. And, in a perfectly straightforward, common sense, way, consecutive sentences for the felony and for the first degree murder wholly dependent on it, constitute double punishment for that underlying felony.

Petitioner submits, then, that it is the government's position which is "contrary to common sense". Moreover, the government's casuistic argument that, "under D.C. Code Ann. 22-2401, . . . neither rape nor any of the other enumerated felonies is a *necessarily* included offense of felony murder, since proof of the commission of *any* of those enumerated felonies is sufficient to support a felony conviction", (Respondent's Brief at 26), entails absurd results. (Petitioner's Brief at 17-18). For example, on this theory an assault with intent to kill—the aiming of the gun just before pulling the trigger—would not be a lesser included offense of the premeditated murder which ensues from the deadly

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victim of the underlying felony, who dies, and where the death occurs at the hands of that victim or the police, rather than of the defendant or a cohort. *See generally*, G. Fletcher, Rethinking Criminal Law §4.4 (1978). The courts of the District of Columbia have not yet had the occasion to define the outer limits of felony murder liability here.

shot. This would be so because, as petitioner argued in his brief, *it is possible* to commit a murder under 22 D.C. Code 2401 without an assault, as by poisoning, and, of course, it is possible to commit an assault with intent to kill without killing. (Petitioner's Brief at 18.) Now, it is true, as respondent points out, (Respondent's Brief at n.11), that administering poison is proscribed in D.C. Code 22-501 along with actual assaultive crimes. But this is mere happenstance, and the poisoning provision is not described therein as a form of assault. At all events, petitioner's point remains valid, for it is surely possible to be guilty of first degree murder without an intent to kill, e.g., by an accidental killing in the course of an enumerated felony, and, again, it is of course possible to commit an assault with intent to kill without actually killing. Thus on the government's theory, assault with intent to kill is *never* a lesser included offense of first degree murder whatever the nature of the murder actually charged.[3] This is ridiculous. The rape here was a lesser included offense of the

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[3]The crowning glory of the government's position is this: a statute that, for example, proscribes possession of a series of named narcotic substances would, on the government's theory, be said to have no required elements at all. This is because there is no single element that need be proved to establish a violation of it. Does this mean that it is a lesser included offense of all other offenses, real or imagined? For by having no necessary elements, it per force has no necessary elements apart from those required for proof of the other offense whatever that offense's elements might be.

Similarly, 21 U.S.C. §846, at issue in *Jeffers v. United States*, 432 U.S. 137 (1977), would state an offense with no necessary elements, for it proscribes conspiring or attempting to do *any one of several* different substantive offenses. Thus it too would be a lesser included offense of any other. If this is so, it is a lesser included offense of §848 even if the "in concert" language of that section does not presuppose an agreement. See n.4, *infra*.

felony murder (rape) for the simple and compelling reason that the rape was charged and proved as the predicate for the murder.

The respondent's attempt to distinguish the prior decisions of this Court is as unpersuasive as its logic. *Brown v. Ohio*, 432 U.S. 161 (1977), the respondent contends, is different because, "here, in contrast to *Brown*, the Court of Appeals in construing the provisions of the District of Columbia Code, has concluded that rape is not a lesser included offense of first degree (felony) murder." (Respondent's Brief at 27). To begin with, this contention misconceives what this Court said in *Brown* about the role of the Ohio courts. While the state court had the final say on construing its statutes, it was not, as the government implies, for that court finally to decide whether, as so construed, one offense was a lesser included offense of the other and hence the same for double jeopardy purposes. As it happens, the Ohio court did conclude that joy riding was a lesser included offense of theft, but that conclusion was clearly subject to review. As this Court said in *Brown*:

> Applying the *Blockburger* test, we agree with the Ohio Court of Appeals that joy riding and auto theft as defined by that court, constitute "the same offense" within the meaning of the Double Jeopardy Clause." 432 U.S. at 168.

Thus, even if here the court below had concluded that rape was not a lesser included offense of felony murder (rape), its decision would be subject to review. But even more important, the government's attempt to distinguish *Brown* misdescribes what the lower court did in the present case; for it did not, as the government suggests, even purport to construe the statutes in such a way that rape was not in fact a lesser included offense

of felony murder, nor did it reach the erroneous (and reviewable) conclusion that as so construed rape was not a lesser included offense. Indeed, it explicitly recognized that "the underlying felony is an element of felony murder". App. at 17. Thus, like the state court in *Brown*, it effectively ruled that despite this relationship between the two relevant offenses, double jeopardy did not proscribe cumulative punishment, and in this respect its decision comes to this Court in precisely the same posture as that of the Ohio court in *Brown*.

With regard to the petitioner's argument from *Jeffers*, (Petitioner's Brief at 19-22), the respondent seems simply to have missed the point entirely. (Respondent's Brief at 27). Its discussion of that case succeeds only in demonstrating the self-evident point that if, as this Court assumed arguendo, "in concert" in 21 U.S.C. §848 did presuppose an agreement, then a conspiracy to commit the substantive violations proved under §848(b)(1) or (b)(2) would have been necessarily lesser included offenses of it. But a §846 count would not, on the government's theory of compound-predicate offenses, be a necessarily included offense; for a violation of §848 *can be* premised on substantive offenses which are not even proscribed under §846. Therefore, because it is possible to violate §848 without conspiring under §846, on the government's theory *Jeffers* should have been an easy case even if "in concert" did presuppose agreement. This would be so whatever offenses were charged under (b)(1) or (b)(2) as the §848 predicate. Yet eight Justices of this Court felt that, assuming "in concert" presupposed agreement, §846 would have been a lesser included offense of §848 because the same substantive offenses were *in fact* charged in the indictments. In other words, while

the §848 violation *could* have been premised on different substantive offenses than those described in §846, in *Jeffers* itself, the predicate offenses actually charged *would*, if proved also have constituted proof of a §846 violation. This is what eight members of this Court thought was critical.[4] It is equally critical here that the rape for which the petitioner was consecutively sentenced was in fact the felony charged as the predicate for the felony murder.

Furthermore, the government's impenetrable treatment of this Court's opinion in *Harris v. Oklahoma*, 433 U.S. 682 (1977), betrays the poverty of its contention that the underlying felony is not a lesser included offense of a felony murder predicated on it. In *Harris*, that contention was clearly repudiated by a unanimous Court which held: "[W]hen, as here, conviction of a greater crime, murder, cannot be had without

[4]The government's argument in n.13 of its brief is obscure. To begin with, the "series of violations" referred to in 21 U.S.C. 848 (b) (2) must itself include a substantive violation of (b) (1), and so such a violation must be "undertaken . . . in concert with five or more persons" to make out a §848 violation. But at all events, under (b) (2), any violations will suffice, so long as at least one of them is a (b) (1) violation. Thus, on the government's approach of looking at the statutes in the abstract, there is still no *necessity* that a §846 violation be proved in making out a §848 violation even if "in concert" does presuppose agreement. Only by looking at the indictments themselves, as eight members of this Court did in *Jeffers*, can we know that the §848 charge did in fact require proof of an §846 violation.

It is conceivable that in this footnote the government is embracing the proposition which petitioner offered as a *reductio ad absurdum* in n.3, *supra*, and arguing that §846 is a lesser included offense of all statutes that proscribe any sort of conspiracy. But even conspiring is not a necessary element of §846, so if this is the government's point, §846 *is* a lesser included offense of §848 even if "in concert" does not presuppose an agreement. See n.3, *supra*.

conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one."

Since this unambiguous holding utterly deflates the government's elaborate "compound-predicate" construct, it is not surprising that its response to *Harris* at pages 29-30 of its brief, can be seen slowly collapsing into its next argument: that even if, rape and felony murder (rape), are the "same offense", the Double Jeopardy Clause simply has no role to play where the issue is multiple punishment rather than successive trials.

Petitioner will not reiterate what he said in his brief with respect to this argument, (Petitioner's Brief at 11-13, 22-26) except to repeat that while this Court has recognized that the Double Jeopardy Clause may provide additional protection where successive trials are involved,[5] it has steadfastly adhered to the view that where two offenses are the same under *Blockburger*, the Double Jeopardy Clause forbids cumulative punishments. Those cases, such as *Gore v. United States*, 357 U.S. 386 (1958), *Albrecht v. United States*, 273 U.S. 1 (1927), and *Morgan v. Devine*, 237 U.S. 632 (1915), which the government cites in support of its contention that the issue is solely one of legislative intent, are grounded on the premise that the offenses involved were in fact different under a *Blockburger* analysis. Indeed, what this Court said in *Gore* itself, implies that cumulative punishment for the same offense is beyond the power of Congress:

> Certainly if punishment for each of separate offenses as those for which the petitioner here has

[5]*Brown v. Ohio*, 432 U.S. at n.6. *See also Ashe v. Swenson*, 397 U.S. 436 (1970).

> been sentenced, and not merely different descriptions of the same offense, is constitutionally beyond the power of Congress to impose, not only *Blockburger* but at least the following cases . . . would also have to be overruled.

357 U.S. at 392.

Similarly, the very language of *Jeffers* which respondent quotes at page 46 of its brief clearly reflects the view that the Constitution sets limits on the permissibility of cumulative punishment:

> If some possibility exists that . . . two statutory offenses are the same offense' for double jeopardy purposes, . . . it is necessary to examine the problem closely, in order to avoid constitutional multiple punishment difficulties.

432 U.S. at 155.

As petitioner pointed out in his brief, on the government's theory that the only issue is one of legislative intent, there are, of course, simply no conceivable "constitutional difficulties" which this Court need seek to avoid. (Petitioner's Brief, pp. 22-26). *See also Simpson v. United States*, 435 U.S. 121 (1978) where this Court's recognition that there are lurking constitutional issues could not be clearer.[6]

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[6]In its opinion, the court below relied on Judge Bazelon's statement on why he would grant rehearing *en banc* in *United States v. Greene*, 489 F.2d 1145, (D.C. Cir. 1973), *cert. denied*, 419 U.S. 977 (1974), for the notion that societal interest analysis is the exclusive test for determining the propriety of consecutive sentences. If Judge Bazelon ever held any such view, he has evidently seen the errors of his ways:

> [E]ven if Congress intends to punish a defendant twice for violating two statutory provisions, the double jeopardy clause may bar such multiple punishment at a single trial

[footnote continued]

Finally, as petitioner pointed out in his brief, the holding of this Court in *Brown, supra*, is explicitly premised on the proposition that the double jeopardy clause proscribes consecutive sentences at a single trial for a greater and lesser included offense:

> If two offenses are the same under this [*Blockburger*] test for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions.

432 U.S. at 166.

This is as it should be; for the Constitution straightforwardly proscribes being twice put in jeopardy "for the same offense." As this Court has said, it was "designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it." *North Carolina v. Pearce*, 395 U.S. 711, 718 (1969), *quoting Ex Parte Lange*, 85 U.S. (18 Wall.) 163 (1873). Acceptance of the government's suggestion that the phrase "same offense", like a chameleon, takes its meaning from its environment,[7] would inject unnecessary difficulties into this already complex area of the law. Moreover, that suggestion flies

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> if the two statutory provisions constitute the "same offense" under *Blockburger*.

United States v. Alston, ___ F.2d ___ (D.C. Cir. Oct. 22, 1979) (No. 77-2050), slip op. at 9, *quoting United States v. Dorsey*, 591 F.2d 922, 942 (D.C. Cir. 1978).

[7]It is ironic that the government so vigorously espouses a "functional approach" to the definition of "same offense" in this context, but apparently argues for a consistent and literal definition in resisting the suggestion for a "same transaction" test with respect to what charges the government must join for trial. *See Abbate v. United States*, 359 U.S. 187, 196 (1959) (opinion of Brennan, J.).

in the face of the language of the constitution and almost 100 years of precedent. It should be rejected once again.

II.

THE ISSUE OF LEGISLATIVE INTENT

In response to petitioner's argument that Congress intended to authorize a sentence of from 20 years to life for felony-murder, but not the longer sentence that would result from cumulating this sentence with that for the underlying felony, the government advances arguments based on the development of homicide at the common law, on the comparative sentences authorized for second degree murder and premeditated murder, and on the enactment of 23 D.C. Code §112. But, at the least, the government here faces a very strong presumption that Congress intended no consecutive punishment for offenses related as felony-murder is to the predicate felony (Petitioner's Brief at 32 n.18); and its arguments fail to overcome it.

In support of the Court of Appeals' treatment of the felony in a felony-murder prosecution as a mere "intent divining mechanism," the government traces the common law development of homicide, first through its division into murder and manslaughter, then through its further division into first and second degree murder, and, finally, through the division of first degree into the premeditated and felony murder varieties. (Respondent's Brief at 62-67). In petitioner's view, the common law antecedents of the District of Columbia murder provisions are in fact somewhat murkier than the government's discussion would suggest, *see Fisher v. United States*, 328 U.S. 463, 482 n.6 (1946) (Frankfurter, J., dissenting); but, at all events, this history is

of little use in resolving the issue at hand. For whatever legal fictions might have sustained the felony-murder rule in the past, the underlying felony now renders the actor's intent, with respect to the homicide, altogether irrelevant. It permits conviction for first degree murder when an altogether unintended and unforeseeable death results during the commission of one of the enumerated felonies. Thus, as the court below acknowledged, the felony is an element of the felony-murder. And, assuming cumulative punishment is constitutional, the question for decision is whether the 87th Congress, when it enacted the present sentencing provision, 22 D.C. Code §2404, intended that a person convicted of felony-murder be subject not only to the mandatory punishment of from 20 years to life for the homicide,[8] but to an additional penalty for the underlying felony as well.

In his initial brief, petitioner cited the legislative history of the sentencing enactment to show that Congress intended that the person convicted of first degree murder and sentenced to prison would become eligible for parole after 20 years. A proposal to permit a longer period of mandatory confinement was defeated on the grounds that after the passage of twenty years, even a heinous criminal might be rehabilitated or his crime might be viewed in a more dispassionate light. To permit consecutive sentencing for the necessarily included felony would altogether undermine this purpose.

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[8] As the government acknowledges, there is no evidence that before 1962 and the enactment of the current 22 D.C. Code §2404, Congress intended such consecutive punishment; for before that time a person convicted of felony-murder faced a mandatory death penalty. This, not logic, best accounts for the fact that second degree murder has been treated as a lesser included offense of felony-murder.

(Petitioner's Brief at 34-38). The government's only direct answer to this argument is the assertion that, for reasons it does not explain, a prosecutor might choose not to charge the underlying felony as a separate count. (Respondent's Brief at 73 n.9). It is just as true, and just as irrelevant, to say that the prosecutor might choose not to indict for felony-murder at all, or choose to seek an indictment only for a lesser offense. The point is, that Congress manifested a clear intent to set an absolute limit on the sentence to be served before parole consideration, following conviction for first degree murder, not, as the government seems to suggest, an intent to leave the setting of that limit to the prosecutor.

The government asserts that petitioner's theory would permit the person convicted of second degree murder, as well as the person convicted of premeditated first degree murder, to be punished more harshly than the person convicted of first degree felony-murder, contrary to the intent of Congress. For the bar against consecutive punishment which petitioner asserts exists, applies only to felony-murder; consecutive punishment for a felony arising out of the same transaction as the killing would be possible, the government says, if that killing is prosecuted on some other theory. In this sense, persons convicted of homicide after proof of actual premeditation or malice could receive a harsher, cumulative penalty. (Respondent's Brief at 72-74).

But the government has chosen the wrong units for comparison. A premeditated murder or murder committed with malice is simply not predicated upon any necessarily included lesser felony, as is felony-murder. Petitioner only asserts that a single felony may not do "double duty"—first, as the basis for elevating to first

degree murder what would otherwise be some lesser form of criminal homicide (or, indeed, no offense at all), and second, as the basis for a separate, consecutive sentence. Nothing in petitioner's argument would prohibit consecutive sentences for felony-murder and for a felony other than the one necessarily included in the homicide. And this is the relevant point of comparison. Petitioner's argument would not preclude consecutive sentencing for any form of murder and for any other felony, except when the felony is necessarily included within the homicide.[9]

Indeed, the government unwittingly concedes in its brief both the major and minor premise to petitioner's central statutory argument, which is that Congress

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[9] After an extended discussion of the societal interests at stake, the government concedes that "there is an inevitable overlap in the interests served by the felony murder provision and the various predicate felony statutes . . ." (Respondent's Brief at 77). This truth is most evident from a consideration of a paradigmatic felony-murder case, the prosecution of a lookout in a simple street robbery, which results in the vicitim's death, not because the robbery was peculiarly violent, but because the victim, unbeknownst to the robbers, was a heart pateint who dies from the shock of the robbery. There is nothing to distinguish the *conduct* of this lookout for the conduct of numerous other persons guilty only of robbery; this lookout may be found guilty of first degree murder only because of a fortuitous *consequence* of that conduct. Thus it is difficult to see why punishment for the murder should not be viewed as embracing also punishment for the robbery. If there is more to the killing than this, then the person may be prosecuted on some other theory of homicide. But to obtain a conviction for felony murder, the prosecutor need only show facts like these. Nor is the analysis any different if it was the victim's companion who died from the heart attack; or if the robbery was only attempted and never consummated. Finally, the fact that Congress provided the same sentence, of from 20 years to life, for felony murder—no matter what the underlying felony—reflects only Congress' intent, amply evidenced in the legislative record, to set a ceiling on the potential, minimum sentence.

could not have intended consecutive sentences, since the result would be to permit harsher punishment for the person convicted of felony-murder than the person convicted of premeditated murder. As the government concedes, (Respondent's Brief at 71), "the legislative record manifests Congress' belief that a person convicted of felony murder would be subject to the same penalty as one convicted of premeditated murder." Yet, earlier on, the government offered this description of the Court of Appeals' holding (*Id.* at 16):

> In effect, the court construed the punishment provisions of the pertinent sections of the District of Columbia Code as though they read as follows:
>
> > For the commission of a premeditated homicide, the defendant shall be sentenced to a term of from 20 years' to life imprisonment. For the commission of any homicide, whether or not premeditated, in the course of a rape, the defendant shall be sentenced to a minimum term of from 20 to 35 years' imprisonment and a maximum term of life imprisonment.

The conclusion that ineluctably follows, although the government does not acknowledge it, is, of course, that Congress could not have intended the result reached by the Court of Appeals.[10]

The government's effort to find support for consecutive sentencing for greater and lesser included offenses from 23 D.C. Code §112 is equally unavailing. (Respondent's Brief at 79-86). As its brief shows, (*Id.* at 80-83), Congress enacted this provision in response to a

[10]The defendant convicted of felony murder would, on the government's view, *always* be subject to harsher punishment because in addition to his sentence for first degree murder he could also be consecutively sentenced on the underlying felony as well.

series of decision from the United States Court of Appeals for the District of Columbia Circuit that required concurrent sentencing in two classes of cases: where the offenses arose out of separate transactions but the sentencing judge failed to specify consecutive sentencing; and, under some limited circumstances, where the offenses arose out of the same transaction and were separate under *Blockburger*. Yet the government asserts that Congress, in addition, intended this enactment to permit consecutive sentencing even for greater and lesser included offenses arising out of the same transaction—a mode of sentencing which was never before thought possible.

The government cites not a shred of evidence from the legislative record in support of this remarkable submission, but relies exclusively on a "plain meaning" argument. In relevant part, 23 D.C. Code §112 permits consecutive sentencing on a conviction

> whether or not the offense (1) arises out of another transaction, or (2) arises out of the same transaction and requires proof of a fact which the other does not.

Clause (2), according to the government, should be read as though it authorized consecutive sentencing whether or not the offense "requires proof of a fact which the other does not, given that they both arise out of the same transaction." But other than to suggest that the statute might have been drafted so as to avoid any possibility of the perverse reading of it that the government makes—a reading which surely could not have been foreseen—the government offers no reason to accept its tortured construction. (Respondent's Brief at 84).

And tortured reading it is; for the only natural meaning of this passage, as well as the only meaning consistent with the conceded purpose of the legislation, is that consecutive sentences may be imposed for offenses arising out of the same transaction, but only when each requires proof of a fact which the other does not. The words "whether or not", as applied to clause (2), simply apply to both conditions mentioned in that clause—same transaction *and* proof of an additional fact—as a unit, and not to each individually, as might have been the case if the disjunctive rather than conjunctive had been used. The statute simply permits consecutive sentencing when the offenses arise out of different transactions whether or not the charges involve commission of the "same" offense;[11] and it permits such sentencing for offenses arising out of the same transaction when the offenses are not the "same".

Moreover, section 23-112 have never been interpreted as the government now urges. One influential analysis of the court reform legislation, of which this section was a part, explained its intended meaning:

> Under new 23 D.C. Code §112, a sentence imposed for an offense is to run consecutively to any other sentence imposed on the same person for another offense (1) if the other offense arises out of another transaction or (2) if the other offense arises out of the same transaction but requires proof of a fact which the other does not. *Sentences do not run consecutively* if the court imposing sentence provides to the contrary or *if the offenses arise out of the same transaction and require proof of the same facts. . . .*

[11] In this class of cases, it was not, of course, the *power* of the trial court to impose consecutive sentences that was at issue.

> This section eliminates the alleged ambiguities which induced the Court of Appeals to resort to the rule of lenity by establishing the intent of Congress with respect to punishment for different offenses. That intent is to authorize imposition of consecutive sentences for offenses arising out of the same transaction which require proof of a fact which the other does not, the test specifically approved by the Supreme Court in *Blockburger v. United States.*

Rauth & Silbert, *Criminal Law and Procedure: D.C. Court Reform and Criminal Procedure Act of 1970*, 20 AM. U.L. REV. 252, 331, 334 (1970-71) (emphasis supplied).[12] Thus, although petitioner did not bring this provision to the Court's attention in his initial brief, it in fact provides additional evidence that Congress intended no consecutive punishment when, as the court below acknowledged with respect to felony murder and the underlying felony, one offense "is an element of" the other. App. at 17.[13]

[12] Mr. Rauh and Mr. Silbert are, respectively, the current United States Attorney for the District of Columbia and his immediate predecessor. At the time the article was published, Mr. Rauh was a Department of Justice attorney, and Mr. Silbert was Executive Assistant U.S. Attorney. Although they disclaimed any intention of speaking for the Department of Justice, id., at 252, their article has often been cited as an authoritative interpretation of the Court Reform Act. *See, e.g., Rushing v. United States*, 381 A.2d 252, 257 (D.C. Ct. App. 1977); *Borum v. United States*, 318 A.2d 590, 593 n.8 (D.C. Ct. App. 1974); *United States v. Miller*, 298 A.2d 34, 36 n.6 (D.C. Ct. App. 1972); *Brown v. United States*, 289 A.2d 891, 892-93 (D.C. Ct. App. 1972); *Jenkins v. United States*, 284 A.2d 460, 464 (D.C. Ct. App. 1971).

[13] The government acknowledges that under its reading of the statute, consecutive sentences could be imposed for such offenses as robbery and armed robbery, which have always been considered

[footnote continued]

Nor does the government's brief advance any convincing reason why this Court should decline to take cognizance of the fact that Congress intended no double punishment here. Unlike *Pernell v. Southall Realty*, 416 U.S. 363 (1974), this is not a case where this Court should abstain from exercising its conceded authority[14] to construe a

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the "same" offense, and for which such sentences have never before been thought possible. (Respondent's Brief at 84-85). It nonetheless suggests that the statute should not be given "literal" effect in such a case (though never giving a principled reason why not, if its reading is in fact correct), and then attempts to downplay the significance of this revelation, by asserting such a problem would arise but seldom, "since offenses standing in such a relationship to one another are not ordinarily charged in separate counts and thus produce only a single conviction." (Respondent's Brief at 84-85). In fact, however, this problem does often arise; for the U.S. Attorney for the District of Columbia frequently charges such offenses as separate counts of an indictment, and lesser offenses are often submitted to the jury. The appellate courts in the District, accordingly, have often vacated convictions for lesser offenses. E.G., *United States v. Johnson*, 475 F.2d 1297 (D.C. Cir. 1973); *Skinner v. United States*, 310 A.2d 231 (D.C. Ct. App. 1973); *Woody v. United States*, 369 A.2d 592 (D.C. Ct. App. 1977); *Bell v. United States*, 332 A.2d 351 (D.C. Ct. App. 1975); *Taylor v. United States*, 324 A.2d 683 (D.C. Ct. App. 1974); *Quick v. United States*, 316 A.2d 875 (D.C. Ct. App. 1974).

[14]That authority is, of course, unquestionable. For example, *Swain v. Pressley*, 430 U.S. 372 (1977), rested on a construction of 23 D.C. Code §110(g), a provision of purely local application. The Court there held that that section precluded the federal courts in the District from granting habeas corpus relief to prisoners who seek to challenge their convictions from the Superior Court. To be sure, the ultimate issue in the case was the scope of federal court authority to issue a writ of habeas corpus. The case arose in the federal courts, but the issue was not altogether dissimilar from the issue here. The issue here, as in *Pressley*, is one of court authority, namely the authority to impose consecutive sentences. And while this case in fact arose in the Superior Court, it could as well have arisen in the local federal courts, for, as pointed out in

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congressional enactment of local application, for here, important federal interests are implicated which were altogether absent in *Pernell*.

Foremost of these is the fact that the statute's meaning is inextricably bound with appellant's assertion that he has been doubly punished, in violation of the Fifth Amendment. Even under the government's restrictive reading of the Double Jeopardy Clause, that clause was violated if petitioner has been sentenced consecutively, contrary to Congress' intent. (Respondent's Brief at 35 & n. 19). Yet the government urges this Court to decline to correct any such error in determining that intent. It argues that such an unconstitutional sentence should be allowed to stand, even though this Court's competence to discern the intent of the national legislature is surely equal to that of the Court of Appeals.[15] Principles of comity should not, in

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text, *infra*, those courts still enjoy some concurrent authority to enforce local criminal laws. Furthermore, as in *Pressley*, the statutory issue here requires resolution because of the unique distribution of judicial power in the District: the concurrent federal-local criminal jurisdiction has yeilded a conflict which may remain unresolved if this Court abstains. *See* text, *infra*, at 20. While the government is of course correct in asserting that the District is like a state in some important respects, particularly after court reorganization in 1970, see Brief at 57, it is also true that "the District of Columbia is constitutionally distinct from the States." *Palmore v. United States*, 411 U.S. 389, 395 (1973). And all can agree with Mr. Justice White's observation that:

> Though today the District of Columbia has a measure of home rule, the United States retains important interests in the District of Columbia, ranging from extensive federal property to the welfare of hundreds of thousands of federal employees.

Key v. Doyle, 434 U.S. 59, 76 (1977) (White, J., dissenting).

[15]As judged by the relevant tools for discerning Congressional intent as set forth in the Government's brief at 60-61, the inquiry of the court below was superficial indeed. It considered only the

[footnote continued]

petitioner's view, restrain this Court from correcting constitutional error in these circumstances. Furthermore, unlike the statute at issue in *Pernell*, the impact of which was limited to the Superior Court, the statute at issue here is a criminal enactment, which remains of federal as well as local concern. For even after court reorganization, the U.S. District Court for the District of Columbia retains jurisdiction over local offenses, when properly joined with federal offenses.[16] *See* 11 D.C. Code § § 502(3). And, in exercise of this jurisdiction, the federal courts must often determine whether or not Congress intended punishment under D.C. Code provisions to be consecutive to other punishment. *E.G., United States v. Alston,* ___ F.2d ___ (D.C. Cir. Oct. 22, 1979) (No. 77-2050) (holding that Congress did not intend consecutive punishment under the District of Columbia false pretenses statute and the federal false statements statute but did intend consecutive punishment for the local offense and federal mail or wire fraud violations).[17]

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interests it thought the statutes served, and based its holding on a misguided "intent divining" theory of felony murder. Most notably absent was any examination of the pertinent legislative history and the circumstances of enactment. And even its "interests" analysis was internally inconsistent. (*See* Petitioner's Brief at 28 n. 12).

[16]Congress has, since court reorganization, further evidenced its view of the continuing federal interest in the enforcement of local penal statutes, when, in granting expanded legislative authority to the District of Columbia Council, it specifically retained exclusive jurisdiction for a time over the criminal law. *See* District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973), §602(a)(9), *as amended by* Act of Sept. 7, 1976, Pub. L. No. 94-402, 90 Stat. 1220, *codified at* 1 D.C. Code §147(a)(9).

[17]As the Circuit Court has stated in the course of resolving an issue similar to that presented in *Alston:*

> [W]e note that the instant case involves the District of Columbia where Congress, in enacting both the federal and

[footnote continued]

The federal interest in the construction of section 2401 is, moreover, even greater than in local penal statutes in general because, as the U.S. Court of Appeals was held, the prosecution here may look to the United States Code, as well as the D.C. Code, for the underlying felony on which to base a felony murder charge. *United States v. Greene, 489 F.2d 1145,* 1150-51 (D.C. Cir. 1973). Thus prosecutions under section 2401 are not all purely local, even to the extent of other D.C. Code violations charged in federal court. Some such prosecutions are "hybrid," involving elements of both local and federal law. Furthermore, this concurrent local and federal jurisdiction over felony murder prosecutions has given rise to a palpable conflict which will remain unresolved if the government's invitation to abstain is accepted. For the United States Circuit Court, in *Greene, supra,* has held that felony murder and the underlying felony do in fact merge. *Id.* at 1158. Because the court's holding in *Greene* does not appear to rest on the Double Jeopardy Clause, it therefore reflects a disagreement with the District of Columbia Court of Appeals over the construction of the statute. If, then, this Court were to reject petitioner's constitutional argument without considering Congress' intent, this conflict between the courts – which was a principal reason petitioner advanced in support of his request for certiorari, as well as a reason that the government did not oppose the writ – would remain unresolved, a manifestly undesirable result.[18]

> local codes, acts as a single sovereign. This court repeatedly has been required to determine whether Congress intended to subject a defendant to multiple punishments for a single act or transaction under similar provision in the federal and District of Columbia criminal codes.

United States v. Dorsey, 591 F.2d 922, 938 (D.C. Cir. 1978).

[18]After court reorganization, review by this Court is virtually the only mechanism for resolving such conflicts between the courts

For these reasons, this Court should exercise its unquestioned authority to construe 22 D.C. Code § § 2401. The propriety of doing so is all the clearer, since if the Court accepts petitioner's argument with respect to Congress' intent, the constitutional issues in this case may be avoided See *Simpson v. United States,* 435 U.S. 6, 11-12 (1978); *Jeffers v. United States,* 432 U.S. 137, 155 (1977).

The government also urges this Court to ignore the question of whether or not Congress intended double punishment under the circumstances of this case because it was not raised in the petition for certiorari. But, to begin with, it was raised. The question presented in the petition was whether the merger doctrine prohibited the consecutive sentence that petitioner received.[19] While petitioner noted that the merger doctrine is, indeed, "an integral part of the Double Jeopardy Clause of the Fifth Amendment," the question of merger is in the first instance a question of statutory construction and legislative intent. The question presented thus fairly encompassed the issues discussed in the second section of petitioner's brief, *viz.*, whether, given the fact that the rape charge was an element of the felony murder charge, Congress intended consecutive punishment

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of the District of Columbia. Before reorganization, of course, decisions of the District of Columbia Court of Appeals were reviewed in the U.S. Court of Appeals. Now even habeas corpus review in the federal courts is ordinarily unavailable to persons convicted in the Superior Court. *Swain v. Pressley,* 430 U.S. 372 (1977).

[19]So far as it is relevant to petitoner Whalen's case, the question presented in the petition was:

> Whether the doctrine of merger of offenses, an integral part of the Double Jeopardy Clause of the Fifth Amendment to the Federal Constitution, precludes the [] trial court [] from imposing consecutive sentence [] on . . . petitioner Whalen for felony murder and the underlying offense of rape. . . .

Petition for Certiorari, at 3-4.

after conviction for both offenses. To be sure, the government's brief in response to the certiorari petition framed the issue more narrowly, as whether the imposition of consecutive sentences here "violates the Double Jeopardy Clause," (Brief in Response to Certiorari Petition, at 2); but surely petitioner is not bound by the government's statement of the question.

Moreover, even if the petition were deemed to present only a constitutional issue, and not an independent issue of statutory construction, the statutory issue would still, on the government's own view, clearly be subsumed within the constitutional issue. *Cf.* Sup. Ct. R. (23 (1) (c) ("every subsidiary question fairly comprised therein" deemed included in question presented for review). For under the government's theory of the Double Jeopardy Clause, punishment greater than that which Congress intended is constitutionally impermissible. As the Government argued in its brief, for petitioner to prevail on his constitutional claim, he must show:

> that the trial court, in imposing separate sentences for rape and felony murder in a single sentencing proceeding following a single trial, has exceeded its legislative authorization by imposing multiple punishments where the legislature did not authorize them. (Respondent's Brief at 42).

Petitioner could hardly undertake this burden without attempting to show, as he did in section two of his brief, that Congress did not intend the consecutive punishment that was imposed.

Finally, under the government's crabbed mode of construing petitions for certiorari, *Jeffers v. United States, supra,* should never have been decided on the grounds that it was. Presented in the certiorari petition in that case was this question:

> Was the double jeopardy clause of the Fifth Amendment violated when the Court of Appeals, relying upon this Court's decision in *Ianelli v. United States*, (420 U.S. 770), held that here may be a continuing criminal enterprise after a conviction on a lesser of conspiracy.

Petition for a Writ of Certiorari, at 2. This question unambiguously presented a constitutional issue and that alone. Yet when the Court decided that *Jeffers* should not have been fined separately on his separate convictions, 432 U.S. at 154-58 (plurality opinion), its decision ultimately rested on the Court's construction of the relevant statutes.

Respectfully submitted,

SILAS J. WASSERSTROM
WILLIAM J. MERTENS
W. GARY KOHLMAN

PUBLIC DEFENDER
SERVICE FOR THE
DISTRICT OF COLUMBIA
451 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 628-1200
Counsel for Petitioner.